**date:** 31 January 2012
**embargo:** 31 January 2012

# Effectiveness of the TUPE Regulations 2006

BIS Call for Evidence - TUC Response

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Section one

# Overview

The Trades Union Congress (TUC) has 58 affiliated unions which represent more than 6 million members employed in a broad variety of sectors and occupations in the public, private and voluntary sectors.

Trade union officials and workplace reps have extensive experience of representing members during TUPE transfers, both through information and consultation arrangements and by ensuring that members benefit from their TUPE related rights.

## Benefits of the TUPE Regulations

There is extensive evidence that contracting out leads to job losses, a serious erosion of pay and conditions of employment and increased inequality, particularly for women and black and ethnic minority workers who tend to work in outsourced sectors. Restructuring also has a detrimental impact on the health and well-being of both the outsourced and remaining workers. This in turn impacts on staff turnover, motivation and productivity. There is also evidence that outsourcing exercises can lead to competition based on pay and conditions. This can lead to a "race to the bottom", with often those in low paid and insecure employment paying the price for restructuring.

The Acquired Rights Directive (ARD) (2001/23/EC) and the Transfer of Undertakings (Protection of Employees) Regulations 2006 (TUPE) Regulations seek to ameliorate these detrimental effects by protecting employment and safeguarding the pay and conditions of outsourced employees. The central aim of the Directive and the TUPE Regulations is to facilitate restructuring in a manner which ensures employment and income security of employees affect and fair competition for businesses. They also ensure that workplace representatives are informed about the potential implications of proposed transfers and that negotiations take place on any envisaged measures relating from the transfer. Providing workers with voice during restructuring processes helps to increase employee confidence, reduces the prospects of disputes over restructuring exercises and secures a higher level of buy-in from the workforce.

The Regulations also help to create a level playing field for businesses. By ensuring that employers cannot compete in tendering exercises on the basis of lower pay and conditions, the Regulations therefore help to promote competition based on quality of service, innovation and efficiency.

Pension provision is an issue of vital importance for employees. The Pensions Act 2004 requires employers to provide minimum pension entitlements

following a transfer, although not pension schemes which the mirror the employees' previous entitlements. The introduction of the Fair Deal for Pensions in 2004, as part of the Cabinet Office Code on Staff Transfers, ensures that public sector staff receive a 'broadly comparable' pension and that previous service is honoured if they transferred to other parts of the public sector or to the private or voluntary sector. Since 1999 the Local Government Pension Scheme has allowed admitted body status to contractors to ensure their staff preserve pension membership and continuity. The NHS has a similar option which has also worked well. These welcome changes have helped to provide employees with income insecurity and to reduce the reliance on means-tested benefits in their retirement.

In the current economic climate, characterised as it is by rising unemployment, increased inequality and household poverty, the TUC believes that the TUPE Regulations have a key role to play in the rescuing of businesses, in maintaining employment levels, retaining skills staff, protecting household incomes and sustaining consumer confidence.

Against this backdrop the TUC believes that there is a strong case, as a minimum, for maintaining all of the existing TUPE protections. In our view calls for the Regulations to be weakened cannot be justified. There is no evidence that the TUPE provisions act as a barrier to restructuring. Outsourcing is an increasingly common feature of both the private and public sector within the UK. Given the impact on employment levels and pay, any liberalisation of existing protections and the expansion of outsourcing is likely to increase job insecurity and reduce income and further suppress demand and consumer confidence.

The TUC does not agree with the CBI and IOD's assertion that the 2006 Regulations and in particular the 'service provision change' provisions 'gold-plate' the requirements of the Acquired Rights Directive. Rather these provisions have contributed to increased business certainty, a reduced need for litigation and increased income security for working people.

The call for evidence rightly acknowledges that any changes to the TUPE Regulations must comply with the ARD. It is therefore surprising that the document seeks views on options for the harmonisation of terms and conditions following a transfer. In the TUC's view, all the proposed options are likely to conflict with existing EU and UK case law and consequently with the Directive itself and therefore should not be adopted.

Rather the TUC believes that the current review provides an important opportunity to bring the existing Regulations into line with EU law and practice; to improve the transparency of procurement processes and to contribute to the Government's growth agenda by providing genuine protection for employment and employees' income levels.

Section two

# Consultation Questions: Responses

## Clarity and Transparency of the 2006 Regulations Overall

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

In general terms the TUC believes that the 2006 amendments have improved the clarity and transparency of when the TUPE provisions apply. As discussed below, the 'service provision change' amendments have significantly increased business certainty and security for transferred staff. They have also reduced litigation on the application of TUPE.

The TUC however is concerned by some creative interpretation of the service provision changes. Firstly, in cases such as *Metropolitan Resources v Churchill Dulwich* [2009] IRLR 700, the EAT suggested that for a service provision change to apply services undertaken by the transferee had to be 'fundamentally and essentially the same'. Secondly, in cases such as *Clearsprings Management Ltd v Ankers and ors* the EAT suggested that service provision change will not have taken place and TUPE will not apply where services are significantly fragmented.

The TUC is concerned these decisions may create opportunities for service providers to restructure and repackage their services in order to avoid TUPE rules. Unions also report that on a number of occasions where services were fragmented as a result of a transfer, employees who are dismissed often do not receive redundancy payments. The TUC would therefore support legislation to close these loopholes.

**Share transfers:** The TUC believes that the Regulations should be amended to make clear that TUPE provisions apply to share transfers, including situations where businesses are bought out by private equity firms. This would improve transparency and ensure that TUPE rules apply consistently to all business transfers.

In our view it is anomalous that certain transactions should attract the protection of TUPE and the ARD whilst others do not. There is no doubt that takeovers and mergers can have devastating consequences for the workers affected. However at present there is limited protection for conditions of

employment or information and consultation rights for unions to ensure that any changes to contracts of employment are negotiated and agreed.

Prior to 2007, it was assumed that TUPE protections did not apply where legal control of a business changed as a result of a share transfer. However in *Print Factory Ltd v Millam,* the Court of Appeal ruled that TUPE provisions can apply to a share transfer where the purchasing company effectively takes control over the running of the purchased business. Given that it is not unusual for purchasing companies to take over the running of a business, the Court of Appeal's decision is likely to wide ranging implications and as a result TUPE provisions will apply to a substantial proportion of share transfers, including private equity buy-outs. The TUC therefore believes that the TUC Regulations should be extended to apply to share transfers and as a minimum the Regulations should be amended in line with the Court of Appeal decision.

**Transfers within public authorities:** The TUC believes it is important TUPE rules apply in all circumstances, including to the reorganisation of administrative functions in central and local government.

The introduction of the Cabinet Office Statement of Practice in 2000 and the use of powers in section 38 of the Employment Relations Act to extend TUPE protections on a case specific basis have helped to protect staff and make Government business more efficient. As the recent decision of the CJEU in the case of *Scattolon v Ministero dell'Istruzione, dell'Università e della Ricerca* (Case C-108/10) confirmed that the ARD applies to some reorganisations between public authorities. Any repeal of the Cabinet Office Statement of Practice would generate unnecessary litigation on when TUPE does and does not apply. It could also lead to unfair and anomalous outcomes, for example, with some employees affected by restructuring within the civil service benefitting from TUPE rights, whilst others have no protection for their employment or pay and conditions.

The TUC would support the removal of the Regulation 3(5) exemption for public administrative transfers. Failing this, the Cabinet Office Statement of Practice should be retained and the Government should exercise its section 38 powers to ensure that TUPE protections apply to all transfers relating to public services.

### Questions 2 & 3: Do the 2006 Regulations provide enough transparency around employment rights and obligations being transferred to ensure a smooth transition? If not, how could this be improved?

### Do employers and commissioners generally comply with the transparency obligations under the 2006 Regulations? 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?**

The TUC believes that there should a full and proper exchange of information between the transferor and the transferee about employment related liabilities prior to any transfer. Lack of transparency is not in the interest of contractors or transferred staff. We therefore support the disclosure of TUPE liabilities at an early stage. Currently, the Regulations only permit transferees to seek remedies relating to the disclosure of information after a transfer has taken place. Consideration could be given to measures permitting selected transferees to compel transferors to disclose all relevant information prior to the transfer taking place. We recognise such measures will have limitations, as transferees will not always be aware of gaps in the information provide before the transfer has taken place. However in some cases, such measures may assist in reducing employment disputes after the transfer.

The TUC also believes that the rights relating to information on employee liabilities should be improved in three key respects. Firstly, the Regulations should require that information relating to transferred liabilities is also shared with recognised trade unions, ideally before it is released to transferees. This would enable trade unions to check the accuracy of the information, relating to contractual terms and conditions, collective agreements and potential and on-going Employment Tribunal claims or other forms of litigation, workplace policies and procedures. It would also reduce the prospect of disputes and Employment Tribunals claims following any transfer.

Secondly, the current statutory obligations on employee liability information arise 14 days before the transfer. This is too short a period. More time should be provided to allow for meaningful consultation between trade unions and the transferor, particularly where the transferee plans to make changes to employees terms and conditions following the transfer.

Thirdly, existing information and consultation arrangements should also be extended. Currently, the duty to consult set out in Regulation 13(6) only applies to employers who envisage they will take measures in relation to an affected employee. In many cases, the transferor does not envisage taking any measures, although the transferee does, for example redundancies, organisational changes, etc. This creates a major gap in TUPE rights. The Regulations should require consultation to take place between recognised unions and the transferee before the transfer takes place.

This change would bring UK Regulations into line with EU law and practice and would help to promote good employment relations. Currently, the first time that workplace representatives have discussions with a new employer is after the transfer has taken place and employees have started to work. Early consultation can increase transparency and avoid potential disputes and Employment Tribunal claims. It would also provide reassurance to transferred

employees, reduce the staff turnover, improve motivation and productivity and reduce costs for the new employer.

In our view trade unions should also be consulted at an early stage during any procurement and outsourcing processes. Employees and their representatives have expert knowledge on how business and services operate and how they can be improved. Early consultation can assist in capturing such insights and improving decision making. Effective employee engagement through workplace representatives can make a valuable contribution to decisions relating to service reviews, tendering specifications and future service and delivery plans. Consultation with recognised trade unions can also assist public bodies to comply with the equality duty and to ensure that vulnerable groups are not disadvantaged by procurement decisions.

## Service provision changes

**Question 4: Does inclusion of service provision changes within the 2006 Regulations 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?**

The inclusion of provisions in the 2006 Regulations dealing specifically with service provision changes has generated significant benefits for businesses, contractors and employees affected by transfers.

The TUC does not believe these changes substantially extended the scope of TUPE rules. Case law from both UK and European Courts have confirmed that the Acquired Rights Directive and Regulation 3(1)(a) can apply to service provision changes. This includes the outsourcing of services (*Rask v ISS Kantineservice A/S* [1993] ICR) and also to in-sourcing exercises (*Dines and ors v Initial Health Care Services* [1995] ICR). However a series inconsistent decisions by the ECJ during the 1990s (notably *Suzen* decision) created major confusion as to when TUPE applied. This created difficulties for employers, contractors and unions. The 2006 amendments introduced welcome clarity.

The 2006 provisions help to ensure that TUPE rules apply to the vast majority of service provision changes. They have increased certainty for businesses, enabling them to plan more effectively. By providing that employees transfer to the new service provider, redundancy costs are avoided and employees retain their employment. The provisions also mean that contractors need to take contractual entitlements and other employment related liabilities into account when preparing bids. This reduces financial uncertainty and risks to on-going service delivery following the transfer.

The 2006 amendments have also provided employees with increased employment and financial security, ensuring that they retain their employment and that their pay and conditions are protected. They also ensure that unions

are consulted and measures which will be introduced by the transferee following a service provision change are negotiated and agreed. Such negotiations reassure the transferred workforce, reduce the prospect of staff turnover and lower the risk of disputes and litigation following the transfer.

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

Union officials and solicitors report that the 2006 amendments have reduced requests for legal advice on the application of the TUPE Regulations during tendering processes.

As businesses and public services are less likely to contest whether TUPE applies, employers and unions are in a better position to use consultation arrangements to resolves issues relating to TUPE transfers, rather than resorting to litigation. This reduces legal costs and helps to promote better employment relations including between the employers and remaining staff.

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

There appears to have been a significant reduction in the number of Employment Tribunal claims as a result of the 2006 amendments, thereby saving costs for businesses, public services, contractors and employees. Prior to 2006, there was a high level Employment Tribunal claims and appeals to the Employment Appeal Tribunal on the application of TUPE rules. Since 2006, the EAT has only considered a handful of appeals, 10 in total, on the meaning and application of the service provision changes rules.

### 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?

The TUC does not believe that there is a case for amending the provisions in Regulation 3 relating to service provision changes. We are not aware of any alternative models which would offer increased certainty or legal clarity and are concerned that any amendments would weaken protections for employees and could disrupt existing working practices and employment relations.

The CBI and BCC have argued that the service provision change rules exceed the scope of the Acquired Rights Directive and therefore 'gold-plate' UK law. The TUC does not share this view. Employers have sought to rely on the on the CJEU's decision in *CLECE SA v Maria Socorro Martin Valor and another* to argue that the 2006 Regulations go beyond the requirements of the Directive. However as the CJEU's ruling in the recent in *Scattolon v Ministero dell'Istruzione, dell'Università e della Ricerca* confirms, service provision change can still fall within the scope of the Directive.

The deletion of the measures relating to service provision changes would recreate significant legal uncertainty and mean that UK law was once again subject to the vagaries of CJEU decisions.

Outsourcing and contracting out is a common feature of the UK service sector. Union officials report that many service sector workers can experience repeated outsourcing exercises in any given year. This is particularly commonplace amongst cleaning, catering and IT support staff. If Regulation 2(1)(b) was removed, such workers would have no certainty that their employment and pay and conditions would be protected following a transfer. This would lead to high levels and financial insecurity. It is also likely to lead to an increase in staff turnover and a loss of skills.

The TUC would therefore not support changes to these provisions.

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

The TUC continues to support the inclusion of professional services in the definition of service provision.

In our view, all professionals should be entitled to the same level of employment protection as blue collar staff. The ARD also makes no provision for different treatment or levels of protection for different categories of workers. Any exemption for professional services cannot therefore be justified.

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

The exclusion of professional services from the definition of service provision changes would create much legal uncertainty and could discourage compliance with the legislation.

The conceptual and legal difficulties in drawing a distinction between professional services and other types of services would be very significant. Any definition is likely to give rise to unforeseen anomalies. For example it is possible that teachers, nurses, planning officers and architects could be defined as professionals and would therefore be exclude from TUPE protections.

In a limited number of cases, Employment Tribunals have decided that TUPE applies where a client decides to move an account from one firm of professionals to another (*Hunt v Storm Communications Ltd and ors* and *Royden and ors v Barnetts Solicitors*). It is important to note however that in both cases the successful claimants had spent at least 70 per cent of their time working for one client and the Tribunal concluded that the remainder of their work was relatively peripheral. The TUC therefore suspects that these judgements will have a limited effect.

Most professionals provide services on a one off, task specific basis and therefore will not be covered by the TUPE Regulations. Where an on-going relationship exists, it is rare that dedicated teams of staff are deployed to service one client. As the *Roydon* case shows, where an individual does not spend sufficient time working on a particular account or contract, Tribunals are unlikely to conclude they are assigned to the activities which transfer. Also in most cases where a service provision change would apply (under Regulation 3(1)(b)) there would also be business transfer (under Regulation 3(1)(a)).

The TUC therefore believes that there is no case for excluding professional services from the definition of service provision changes. In our view professional service companies are more than capable of organising services so as to fall outside the definition of a service provision change should they so desire.

## Harmonisation of Terms and Conditions

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

The TUC believes there is no justification for extending the circumstances where employers can reduce terms and conditions following a business transfer or service provision change.

We would strongly oppose any changes to the Regulations which permitted the harmonisation of terms and conditions following a transfer, for the following reasons.

### *a) Erosion of pay and conditions*

The options outlined in the call for evidence would substantially weaken the central employment protections contained in the TUPE Regulations. As such they appear to conflict directly with the statement contained in the Ministerial Foreword to the consultation document that there is a *'need for a core of fundamental employment protections to safeguard employees from unscrupulous employers and create a level playing field for good employers.'*

It is well-documented that the existing TUPE Regulations only provide limited and often transient protection for pay and conditions. Outsourcing often results in a significant erosion of pay and conditions.

- For example, a 2008 National Audit Office (NAO) report analysed the impact of terms and conditions of staff transferred to a private sector contractor through a public private partnership (PPP) or a private finance initiative (PFI) deal. The study revealed that three years into the contract the average pay of manual workers in soft FM services fell from £5.88 to £5.75

an hour between the transfer and October 2004.[1]

The reduction in pay and conditions particularly for low paid workers in turn contributes to increased inequality for disadvantaged groups, including women and black and ethnic minority workers who are disproportionately employed in contracted out services.

- Analysis of a million employees in the lowest paid occupations reveals that 74 per cent of cleaners and domestics are women and 83 per cent of those women work part time.[2]
- Similarly 65 per cent of kitchen and catering assistants are women, of which 71 per cent work part time.

The TUC is concerned that any further liberalisation of TUPE protections will accelerate the erosion of pay and conditions and will also increase employment insecurity for employees working in contracted out businesses and services.

### *Existing flexibility to vary terms and conditions*

UK employers already have extensive flexibility to agree changes to terms and conditions following a transfer.

**Firstly, employers are free to harmonise terms by agreeing improvements in pay and conditions.** There is nothing in the Regulations or the Directive which prevents an employer from harmonising terms and conditions by agreeing improvements in pay and conditions. Employers however should be aware that they cannot subsequently rely on the TUPE Regulations to resile from improved terms which have been agreed with the employee or their representatives (see the Court of Appeal decision in *Regent Security Services Ltd v Power* [2007] EWCA Civ 1188). It is also good practice for employers to consult with their workforce on how conditions should be improved. Consultation and negotiations with trade unions can help to ensure that proposed changes benefit the entire workforce.

The levelling up of pay and conditions can bring benefits for employers and employees. It can help to deal with any workplace tensions due to staff being paid different rates of pay. It can also reduce inequalities, reduce workforce turnover, increase workforce motivation and improve team working.

**Secondly, employers are able to agree variations to contractual terms where the reason for the variation is not connected to the transfer** (Regulation 4(5)(b)). The DTI guidance on the TUPE Regulations includes examples of reasons which may be unconnected with transfer:

- The sudden loss of an expected order by a manufacturing company
- An upturn in demand for a particular service

[1] *Protecting Staff in PPP?PFI deals* National Audit Office March 2008
[2] Source: 2011 ONS Annual Survey of Hours and Earnings

- A change in a key exchange rate

It is of course important that any such variations are agreed with employees in line with the requirements of Regulation 4(5)(b) and normal contractual principles. Early consultation with trade unions during which the employers fully discloses the case for such variations will assist in reaching agreement and avoiding potential disputes.

**Thirdly, employers can agree variations which are connected to the transfer by which are made for economic, technical or organisational reasons entailing changes in the workforce** (ETO Reasons) (Regulation 4(5)(a)).

Since 2006, unions report that employers have increasingly sought to rely on Regulation 4(5)(a)to press for cuts to pay and conditions following a transfer.

Such practices have been particularly prevalent in certain sectors including the voluntary sector, where employers has sought to use the provisions as a means of managing funding cuts from central and local government. Teaching unions also report that some local academies and free schools have sought to rely on Regulation 4(5)(A) to introduce reduce pay and conditions which undercut the national agreement.

During the consultation on the 2006 Regulations, the TUC expressed concerns that employers may use Regulation 4(5)(a) to pressurise union representatives and in particular non-union workplace reps into agreeing to reduced pay rate and worse conditions of employment. Regrettably these concerns appear to have been well-founded.

Unions have also expressed concern that employers fail to understand that Regulation 4(5)(a) will only apply in limited circumstances. Detrimental changes to terms and conditions are only permitted where there is an ETO reason *entailing changes in the workforce* – i.e. economic, technical or organisational reasons require a change in the functions of the workforce or where there is to be a reduction in headcount or staff redundancies[3].

Some employers have sought to rely on these provisions where they wish to vary working hours or simply to harmonise terms and conditions. Such practices are not consistent with either the Regulations or the Directive and effectively undermine employees' TUPE entitlements.

Given the extent of the flexibility already available to employers and the degree to which it is already used to reduce pay and conditions of contracted out staff, the TUC can see no case for the further deregulation of TUPE protections.

### *Compliance with the Directive*

[3] *Berriman v Delabole Slate Ltd* [1985] ICR 546

The TUC supports the statement in the consultation document that any changes relating to the harmonisation of terms and conditions must comply with the Directive.

On this basis the TUC firmly opposes the proposals relating to harmonisation set out in the call for evidence. In our view, all the options under consideration fail to comply with the Directive and the principles established by the ECJ in the *Daddy's Dance Hall* case.

Furthermore the TUC believes that the *existing* Regulations also do not satisfy the requirements of the Directive. In our view, Regulation 4(5)(a) which permits variations to pay conditions which are connected to the transfer but are justified by an ETO reason entailing changes in the workforce has no basis in EU law and breaches the principles set out in the *Daddy's Dance Hall* case.

In this case the Court established the principle that the transfer of an undertaking itself may *never* constitute the reason for a detrimental variation to an employees' terms and conditions of employment. Nothing in the ECJ's ruling or in subsequent decisions where the *Daddy's Dance Hall* principle has been reapplied suggests that even a limited exception to this rule is permissible.

The TUC therefore calls on the Government not to proceed with any of the options outlined in the call for evidence but rather to repeal Regulation 4(5)(a).

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

No. Any changes in this area would weaken TUPE protections and could have a detrimental impact on industrial relations within the UK.

The TUC recognises that one aspect of the law on the application of collective agreements is due to be clarified by the CJEU in the *Alemo-Heron & Ors v Parkwood Leisure* case. In this case, the Supreme Court has asked the CJEU to consider whether the use of a dynamic approach to the application of terms and conditions derived in a collective agreement is consistent with or goes beyond the minimum requirements of the ARD.

Prior to the *Alemo-Heron*, it had long been accepted that UK employees could rely after a transfer on contractual terms providing that pay and other conditions would be determined in line with collective agreements agreed between the transferor and recognised trade unions. This approach had previously been endorsed by the UK courts (*E.g. Whent v T Cartledge Ltd* [1997] IRLR 153). It is also consistent with the normal rules of contractual interpretation.

The TUC hopes that Unison, who are supporting the case, are successful, However, whichever way the CJEU decides the *Alemo-Heron* case, the TUC would call on the UK Government to ensure that collective agreements can still

be interpreted dynamically and that employees are able to rely on terms within their contracts stating their pay and conditions will be set by negotiations between the original employer and recognised trade unions. There is nothing in the Directive which would prevent this approach. Under Article 8, national governments are fully entitled to adopt measures which exceed the minimum requirements of the ARD.

There are also clear legal and policy justifications for this approach. Prior to the *Alemo-Heron* case, many commentators argued that the dynamic approach to interpretation was consistent with normal contractual rules. It also helped to prevent the creation of a two-tier workforce, with in-house employees being protected by annually negotiated pay rises and outsourced staff experiencing pay freezes or even pay cuts.

The TUC would therefore not support any provision limiting the future observance of terms and conditions derived from a collective agreement.

### 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?

No. It would not be helpful to introduce proposals permitting employers to justify any detrimental variations to terms and conditions on the basis that the employees' overall package of entitlements was no less favourable would not be consistent with EU law and is likely to lead to discriminatory outcomes for employees. The TUC is concerned that this would be an encouragement for employers - either by default or design – to attempt to implement detrimental changes to their terms and conditions.

The proposal for a package approach to variations to contractual terms is also not consistent with the term by term approach used in EU employment law. The approach taken by the ECJ recognises that different employees will tend to attribute varying weightings to different conditions of employment. For example, employees with children may value paid time off with their families more than access to paid overtime. Similarly those without caring responsibilities may value enhanced holiday entitlements over flexible working arrangements. A package approach is therefore likely to result in unfair outcomes for different groups of employees.

It would also be very complicated for courts and tribunals to apply, particularly in relation to non-monetary benefits and would therefore generate complex litigation.

Finally, as the EFTA court explained in *Langeland v Norske Fabricon A/S* [1997] 2 CMLR 966, the package approach and indeed all the options outlined in the call for evidence would not be inconsistent with the requirements of the Directive:

> *'The purpose of the [Acquired Rights] Directive is to ensure that the rights arising from a contract of employment or employment relationship of employees affected by the transfer of an undertaking are safeguarded. Since this protection is a matter of public policy, and therefore independent of the will of the parties to the contract of employment, the rules of the Directive must be considered to be mandatory, so that it is* ***not possible to derogate from them in a manner unfavourable to employees****. It follows that employees are not entitled to waive the rights conferred on them by the Directive and that those rights cannot be restricted even by their consent. This interpretation is not affected by whether the employee* ***obtains new benefits in compensation for the disadvantages resulting from his contract of employment so that, taking the matter as a whole, he is no placed in a worse position than before****.' [Emphasis added]*

The TUC therefore does not see the case for or support the suggestions made in relation to the harmonisation of 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?**

The Court of Appeal's decision in *Key2Law (Surrey) LLP v De'Antiquis* has helpfully clarified the law relating to the application of TUPE rules in insolvency situations. The Court decided that all administrations are covered by TUPE Regulations and are not exempted by virtue of Regulation 8(7). This is because administrations do not constitute insolvency proceedings 'instituted with a view to the liquidation of the assets'. It is particularly welcome that the Court of Appeal held that pre-pack situations were covered by TUPE rules and that courts are no longer be required to consider whether the administrator *intended* to liquidate the assets of the company. There is no need for the legislation to be amended in this area, although accompanying guidance should be updated to highlight that TUPE rules apply in all insolvency situations.

In addition, the TUC is concerned that too often in insolvency situations, insolvency practitioners (IPs) fail to comply with their legal responsibilities towards employees. In particular, unions report that IPs, more often than not, fail to inform or consult with workplace representatives where TUPE transfers are expected to take place or collective redundancies are contemplated. Consideration should be given to imposing a financial penalty on IPs where they have failed to comply with Regulation 7. Currently there is no incentive on the IP to comply with the law as protective awards can be sought from the

National Insurance Fund or from the assets of the insolvent business. This transfers all the costs onto the taxpayer.

**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?**

The 2006 amendments have substantially improved the transparency and clarity of the TUPE Regulations. This has also reduced the risk of employment disputes and costs.

However as argued above the TUC also believes that Regulation 13 should be extended to require that consultation should take place between the transferee and recognised trade unions prior to the transfer. Early consultation will improve the new employer's awareness of their future liabilities, will reduce the risk of disputes and Employment Tribunal claims and will promote good employment relations.

**Question 15: Should liability for pre-transfer obligations be transferred entirely to the transferee as is the case currently in the Regulations 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.**

On issues of liability, the main concern for employees is that they are able to recover unpaid wages or compensation for breaches of other employment rights simply and without undue delay.

The TUC recognises that transferring all debts to the transferee in insolvency situations may have significant implications for the 'rescue culture' and the willingness of transferees to take over otherwise insolvent businesses. There may be merit in providing that debts up to the statutory limit can be recovered from the National Insurance Fund. Any debts in excess of this amount should transfer to the transferee. However the TUC would be concerned by any proposals that liability should rest with an insolvent company which has assets. This could make it harder for employees to enforce any Employment Tribunal award.

## 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?**

The TUC recognises that there is a case for additional guidance on the meaning of an economic, technical or organisational reason (ETO) entailing changes in the workforce. This concept is central to employees' unfair dismissal rights and to provisions relating to variations to terms and conditions which are connected to the transfer.

The guidance should emphasise that ETO provisions will only justify dismissals or detrimental changes to pay and conditions in very limited circumstances. The guidance should mirror the relevant case law. In particular it should spell out the decision of the Court of Appeal in *Berriman v Delabole Slate Ltd* [1985] ICR 546. This case established that for the ETO defence *entailing change in the workforce* to apply there **must be** a change in the job functions or the numbers of workforce as a whole.

It is not sufficient that an employer simply wishes to harmonise terms and conditions or to vary working hours. The guidance should clearly state that employers must also demonstrate that the ETO reason involves changes in employees' actual roles and in their job descriptions or a reduction in head count for example through redundancies.

In addition, it may be helpful for the guidance to clarify the distinction between a dismissal which is 'by reason of a transfer' and one which is 'for a reason connected with the transfer'.

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

As argued above the TUC believes that the duty to consult trade union representatives set out in Regulation 13 should be extended. Currently Regulation 13(6) provides that employers are only under a duty to consult any on measures which are envisaged. Often the transferor will not envisage any measures related to the transfer and therefore will not consult workplace reps. This is even though the transferee does envisage measures (for example, redundancies, restructuring etc). As a result there is a significant gap in the legislation. The TUC believes Regulation 13 should be amended to provide that consultation should take place between trade unions and both the transferor and transferee prior to the transfer.

The guidance should highlight the benefits of early consultation involving both the transferor and the transferee. This includes increased awareness for the transferee of their future liabilities; increased reassurance for staff affected by transfers and the promotion of good employment relations. The Regulations and accompanying guidance should also stress that it is essential that consultation takes place at an early stage and certainly well in advance of any decisions relating to any measures which will be taken.

## 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?**

The TUC recognises that the ARD is implemented in a variety of different ways across the EU. These differences often reflect the diverse industrial relations systems which exist in the EU.

In many Member States, the existence of sectoral and national collective agreements means that employees will automatically continue to receive the same pay and conditions following a transfer. They will also receive the same pay and conditions as existing employees and new recruits in the organisation to which they are transferred. Such arrangements ensure fair treatment, promote equality and ensure that outsourcing does not lead to the erosion of pay and conditions. They also create a level playing field for employers by avoiding unfair competition based on the undercutting of pay and employment conditions. They also help to facilitate restructuring by avoiding disputes.

The TUC believes that similar benefits could be achieved in the UK. A good starting point would be for the Government to adopt a fair wages resolution for public contracting. Under such a resolution wage rates would be based on the relevant collective agreement and would apply to all staff, not simply those who are transferred, during the life of the contract. This policy would not only avoid competition based on wages but would also promote competition basis on efficiency, innovation and quality of service.

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

The TUC is increasingly concerned that employers are seeking to use compromise agreements to avoid future claims relating to the failure to inform and consult with trade unions or workplace representatives. We consider that such use of compromise agreements is not appropriate. Information and consultation rights pertain to trade union and workplace representatives. It is therefore not possible for individual employees to compromise these rights.

**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 Regulations and the rules on collective redundancy consultation fit together.**

The TUC has submitted a detailed response to the call for evidence on collective redundancy consultation rules.

As highlighted elsewhere, the TUC has a number of concerns relating to the operation of information and consultation in TUPE transfer situations. Firstly,

in our view Regulation 13 needs to be amended to ensure that consultation on proposed measures takes place between trade unions and the transferee prior to the transfer. Secondly, trade unions should have a right to receive information about employee liabilities. This information should be shared at an early stage to enable genuine consultation. Thirdly, measures are needed to ensure that insolvency practitioners observe their duties to inform and consult trade union and workplace reps.

## 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?

No. The TUC believes that TUPE protections should apply equally to all employees. In our view there is no justification in treating managerial staff differently to other employees. Many of the same arguments set out in response to question 8 on professional services also apply here.

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

Throughout this response, the TUC has outlined issues relating to developments in recent case law.

In summary:

- The TUC is concerned that recent decisions by the EAT, service providers may seek to avoid TUPE rules by fragmenting or repacking their services (see response to question 1)
- There is currently a lack of clarity in relation to transfers to multiple service providers (*Cf Kimberley Group Housing Ltd v Hanley)*. This can cause uncertainty for all parties. It would be helpful if the 2006 Regulations could more clearly state the principle established in *Kimberley* and reflecting the list of factors set out for considered by the ECJ in *Botzen v Rotterdamsche Droogdock Maatschappij* [2005].
- Regulation 13 should also be updated to reflect the decision in *Todd v Strain & Others*. In this case the EAT established two important principles. Firstly it clarified the meaning of the term measures, confirming that purely administrative measure such as the change in the pay date is a measure which must be consulted on. Secondly, it confirmed that the duty to provide information is separate and independent of the duty to consult workplace representatives.
- In *Cable Realisations Ltd v GMB Northern* the EAT concluded that

employers may take holidays and closure dates affecting their business into account when assessing the length of time they must allow to fulfil their information and consultation obligations. Regulation 13 and accompanying guidance should be updated to reflect this.

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

Throughout this submission the TUC has highlighted a number of aspects of which would benefit from review and change. These include:

- The scope of TUPE provisions should be extended to share transfers and private equity buy-outs. As a minimum there is a need to amend the Regulations to reflect the Court of Appeal's decision in *Print Factory Ltd v Millam.*
- Regulation 11 or 13 should be amended to provide that union representatives are supplied with information about employment related liabilities before it is provided to the transferee. This will enable union representatives to check the accuracy of the information provided thereby improving transparency and business certainty for transferees.
- The scope of the information and consultation rights in Regulation 13 should be extended to include consultation between the transferee and recognised trade unions or workplace representatives in non-union workplaces before the transfer takes place. Early consultation will help to build good employment relations from the outset and will reduce the risk of employment disputes.
- Provision should also be made for consultation with recognised unions at an early stage in the procurement process. Consultation with union officials can help to inform decisions on service delivery plans and tendering specifications.

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

There is a lack of clarity as to when TUPE protections apply 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.

The current Regulations apply to transfer employees "assigned to the organised grouping of resources or employees". However, the Regulations do not clearly define what is meant by "assigned". Whether an employee is assigned is therefore a question of fact. In the *Botzen* v *Rotterdamsche Droogdok v Maatschappij BV* [1986] 2 CMLR 50) the ECJ set out a number

of factors, including the percentage of time spent working in the grouping being transferred, which should be taken into account. The TUC believes that the Regulations should include a mechanism where employees that are deemed to be assigned to a group can object to such an inclusion, or seek to be included into such a group as no such right for an employee exists.

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