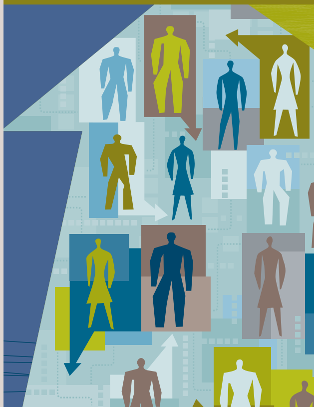
MORRISON | FOERSTER

IN BRIEF
UK Employment and HR Newsletter

MORRISON & FOERSTER MNP
Vol 1, No 2. September 2006



For more information about any of the enclosed articles, please contact:

Ann Bevitt
at +44 20 7920 4041
or abevitt@mofo.com

Suzanne Horne
at +44 20 7920 4014
or shorne@mofo.com

New TUPE

PART 1: OUTSOURCING

As many readers will know, "TUPE" is the set of regulations in the UK dealing with the automatic transfer of the employment contracts of employees engaged in an undertaking which is transferred. As featured in our legal update "New TUPE Regulations" February 2006[1], the UK government issued new draft regulations to update TUPE to take account of the revised Acquired Rights Directive[2] (the "ARD") and recent European and domestic case law. On 6 April 2006, the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("New TUPE") finally came into force. New TUPE[3] replaces the Transfer of Undertakings (Protection of Employment) Regulations 1981 ("Old TUPE") in its entirety. Whilst the practical impact of New TUPE is still being discussed, one fact is certain: people issues and in particular the principle of automatic transfer, as illustrated below, will remain a feature of all outsourcing arrangements, even where the provision of the service is being moved abroad.

As a result, customers, suppliers and replacement suppliers alike need to get to grips with New TUPE.

This two-part feature looks at New TUPE and how it applies to changes in service provision, i.e. outsourcing. This first article focuses on the key relevant provisions and concepts implemented by New TUPE and considers changes in service provision in the rest of Europe. The second article will analyse the application of New TUPE to offshoring and onshoring.

OVERVIEW

- **Wider Scope:** New TUPE will now apply to most outsourcings, second-generation outsourcings and insourcings.
- **Requirement to Provide Employee Information:** There is now a requirement on the customer or out-going supplier to notify the replacement suppliers of "employee liability information".
- **New Allocation of Liability for Failure to Inform and Consult:** The customer or out-going supplier and any replacement supplier will now be jointly and severally liable for a protective pay award for a failure to inform and consult.
- **Limited Flexibility to Change Terms and Conditions Post-Transfer:** Changes to terms and conditions of employment post-transfer are now valid if they are for a reason connected with the transfer but which is an "economic, technical or organisational reason" entailing changes in the workforce.

In Brief is for the benefit and information of clients and friends and is not legal advice or legal opinion on specific facts or circumstances. The contents are intended for information purposes only.

To change mailing information or unsubscribe, please send an e-mail to rhall@mofo.com.

www.mofo.com
©2006 Morrison & Foerster MNP.
All Rights Reserved.

- **Clarification on Transfer Related Dismissals:** Dismissals will be automatically unfair if they are by reason of the transfer or for a reason connected with the transfer where there is no "economic, technical or organisational reason" entailing changes in the workforce.
- **Easier to Claim Constructive Dismissal:** Employees can now resign and claim constructive dismissal in connection with a transfer if there is a substantial change in working conditions to their material detriment. They no longer need to show that there is a breach of contract.

Key Relevant Provisions and Concepts

WIDER SCOPE - SERVICE PROVISION CHANGES

It is clear that New TUPE now applies to most outsourcings, second-generation outsourcings and insourcings ("service provision changes"). This eradicates much of the uncertainty as to whether Old TUPE applied to such arrangements. The only exemptions will be: where a customer buys in services of short-term duration from a supplier on a "one-off" basis; and where the arrangement between customer and supplier is wholly or mainly for the supply of goods for the customer's use. In the draft regulations published on 15 March 2005, the Government mooted a proposal that the provision of professional business services by firms such as accountants and lawyers should be exempted from New TUPE to prevent a relevant transfer occurring where a client had engaged professional teams, such as consultants, to provide on-going business advice[4]. However, the professional business services exemption was dropped from the final version of the regulations and such employees remain capable of transferring to replacement suppliers.

If there is a service provision change, there will be a transfer of employees if they are an organised grouping in Great Britain[5] whose principal purpose is to carry out the service activity and the intention is that the service activity will be carried out post-transfer. A grouping of employees can constitute one person[6] and New TUPE can also apply to employees based in overseas locations if they are part of the organised grouping. However, whether employees affected by the transfer who ordinarily work outside of the UK can bring a claim under New TUPE will depend upon the normal jurisdictional principles of international law. Who is or is not assigned will continue to be a live issue.

In essence, it is now more difficult to argue that New TUPE does not apply by scoping or providing the services in a different way or by there being no transfer of assets. If the service activity transfers, the employees transfer.

REQUIREMENT TO PROVIDE EMPLOYEE LIABILITY INFORMATION

There is now a requirement to provide "employee liability information". Employee liability information is defined as information about identity, age, information contained in statutory employment particulars, information relating to any applicable collective agreements, instances of any disciplinary action and grievances in last two years covered by the statutory dispute resolution procedures, instances of legal action taken by employees against the customer or out-going supplier in the last two years and instances of potential legal actions where the customer or out-going supplier has reasonable grounds to believe that such action might occur. The information must be provided at least two weeks before the completion of the transfer unless there are exceptional circumstances; not more than two weeks old on the date it is provided; and updated, if there are material changes. Any complaint of non-compliance must be brought by the replacement supplier in the Tribunal within three months of the date of the alleged failure. The minimum sanction for non-compliance is £500 for each employee in respect of whom the information was not provided payable to the replacement supplier, unless it would be unjust or inequitable. There is no maximum.

These types of claims are most likely to arise between the out-going supplier and replacement supplier. We can advise customers on practical ways to avoid becoming embroiled in a chain of indemnity in claims between the out-going supplier and replacement supplier through the use of contractual provisions and the careful management of the due diligence process.

NEW ALLOCATION OF LIABILITY FOR FAILURE TO INFORM AND CONSULT & THE OBLIGATION

Under New TUPE, the maximum amount of compensation for a failure to inform and consult remains at 13 weeks' uncapped pay for each affected employee. The customer or out-going supplier will now be jointly and severally liable with the replacement supplier for a failure to inform and consult. The provisions in respect of how this liability will be attributed in practice are quite complex as the complainant will have the choice of who to sue and the Tribunal will have discretion to apportion liability fairly. For example, if the complaint against the replacement supplier is upheld, the replacement supplier is solely liable for paying the compensation. However, if the complaint is against the out-going supplier and the out-going supplier alleges its default is due to the replacement supplier's failure to provide it with the

relevant information, the out-going supplier must notify the replacement supplier who is then joined to the proceedings. If the Tribunal determines that the replacement supplier is at fault, the award will be against the replacement supplier. If not, the award will be against the out-going supplier but the replacement supplier will be jointly and severally liable. If there is a failure to meet any award, the employee can complain to the Tribunal and the replacement supplier and out-going supplier then become jointly and severally liable to pay the award. Inevitably, these provisions of New TUPE will result in more multi-party claims in the Tribunal and so there has never been a greater need for properly worded warranties and indemnities.

In addition, a minor tweak in the wording of New TUPE now places an obligation on the customer or out-going supplier to themselves consider what measures the replacement supplier may take. This means that where the customer or out-going supplier is informally aware that the replacement supplier may be considering measures, it may also be responsible for communicating this fact to the employees.

LIMITED FLEXIBILITY TO CHANGE TERMS AND CONDITIONS POST-TRANSFER

Changes to terms and conditions will only be valid if they are made for a reason unconnected with the transfer or for a reason connected with the transfer where there is an "economic, technical or organisational reason entailing changes in the workforce" (an "ETO"). There is no definition of what is an ETO. However, it is likely to include: a reason relating to the profitability or market performance of the replacement supplier's business (economic); a reason relating to the nature of equipment or production processes which the replacement supplier operates (technical); or a reason relating to management or organisational structure of the replacement supplier's business (organisational). Further, the reason must also entail changes in the workforce. This means changes in the numbers employed or changes in the functions performed by the employees. As a result, it is likely that harmonisation of terms and conditions will not amount to an ETO, even when the employees agree to the changes.

CLARIFICATION ON TRANSFER RELATED DISMISSALS

As stated above, dismissals will be automatically unfair if they are by reason of the transfer or for a reason connected with the transfer where there is no ETO (see above for an explanation of what constitutes an ETO). An example of an ETO in this context would be where the replacement supplier intends to provide the services from a different location many miles from where the affected employees are currently based - any redundancies due to the change in location would be potentially fair (provided it went through a fair redundancy process). Other dismissals which are not due to redundancy will be for some other substantial reason within the meaning of unfair dismissal law. Unless the parties to an outsourcing agreement agree otherwise, the risk of unfair dismissal claims will rest with the replacement supplier. Where a Tribunal finds that a complaint of unfair dismissal is well-founded, it may make an order for the reinstatement or re-engagement of the employee (or award additional compensation for failure to comply with such an order) or award compensation comprising of up to £8,400 (basic) and £58,400 (compensatory) per employee.

EASIER TO CLAIM CONSTRUCTIVE DISMISSAL

New TUPE provides that an employee can claim constructive dismissal in connection with a transfer where there is a substantial change in their working conditions to their material detriment even if the change is not a breach of contract. Therefore, employee claims could be based upon a material detriment arising from non-contractual rights or benefits such as profit share schemes. Where an employee makes such a claim pursuant to New TUPE, he cannot recover damages for wrongful dismissal where he did not work his notice period and any compensation will be limited to unfair dismissal compensation. (See above). In addition to this new form of constructive unfair dismissal, an employee's ability to either claim constructive dismissal where there has been a breach of contract or object to the transfer has been preserved.

CHANGES IN SERVICE PROVISION IN THE REST OF EUROPE

As stated above, New TUPE is designed to implement the revised ARD and recent European and domestic case law. However, New TUPE goes further than the ARD in that the ARD does not contain the concept of a "service provision change" in the text of the Directive. Under the ARD, a relevant transfer is defined as where there is "a transfer of an economic entity which retains its identity, meaning, an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary" ("ordinary business transfer"). This definition is also contained in New TUPE.

As there is no "service provision change" provision in the ARD, in other EU member states[7] in order for there to be a "relevant transfer" when there is a service provision change,

the parties must consider whether it constitutes an ordinary business transfer as modified by national laws and ECJ case law. Accordingly, a relevant transfer is where there is:

- **France:** a transfer of an autonomous economic entity (*entité économique autonome*), which retains its identity;
- **Germany:** a transfer of an economic entity involving a transfer of main assets that are necessary for the business, or part of the business, to continue;
- **Italy:** a change in legal title of an autonomous economic entity, organized with a view to the production or exchange of goods or services that exists prior to the transfer and retains its identity on the transfer;
- **The Netherlands:** an undertaking (or part) which transfers involving the transfer of a separate economic entity that retains its identity.

In accordance with ECJ case law, any determination of the above will entail an assessment as to whether the nature of the business or activity is "asset-reliant" or "labour intensive"[8] and whether the economic entity retains its identity. These factors are now irrelevant when there is a service provision change pursuant to New TUPE.

Given that national laws in Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Hungary, Ireland, Italy, the Netherlands, Poland, Portugal, Slovakia, Spain, Sweden and Switzerland all provide for the automatic transfer of employees, we can assist customers and suppliers alike in identifying if the ARD or applicable local legislation applies and project managing people issues in cross border and multi-jurisdictional outsourcings, thereby avoiding unnecessary disputes and litigation.

PRACTICAL STEPS TO ADDRESS NEW TUPE

- Review your due diligence process to ensure it encapsulates the new obligations to provide and process employee liability information in compliance with the Data Protection Act 1998 and the Employment Practices Code. (The information either needs to be in writing or be "readily accessible". It can be given in more than one instalment and through a third party. As there is no obligation on the replacement supplier to request the information, customers and out-going suppliers need to be proactive).
- Exchange the information in a timely manner and ensure there is a paper trail to evidence the exchange.
- Update your standard RFP and terms and conditions to ensure that any references to Old TUPE are replaced and that the warranties and indemnities reflect the new rules.
- Consider whether you need to agree internally your organisation's position in relation to any of the new rules ready for supplier selection process and the contract negotiation.
- Carry out an audit of your existing on-going contracts to identify if there is an existing ability or obligation to obtain or provide staffing information and how these fit with the requirement to provide employee liability information.
- Consider whether any internal risk assessments need to be re-evaluated due to the increased likelihood that New TUPE will now apply to most service provision changes.
- Ensures that at the RFP stage the price and structure of the outsourcing or secondary outsourcing reflects the increased likelihood that all service provision changes are likely to result in the transfer of assigned employees. ■

[1] See article New TUPE Regulations 02/07/2006; http://www.mofo.com/mofo_dev/international/EU_en/news/files/updates/update02137.html. See also http://www.mofo.com/international/EU_en/news/files/updates/update02099.html.

[2] (2001/23/EC) on the approximation of the laws of the Member States relating to the safeguarding of employees" rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

[3] For the full text of New TUPE, see www.opsi.gov.uk/si/si2006/20060246.htm

[4] See article New TUPE Regulations 02/07/2006; http://www.mofo.com/mofo_dev/international/EU_en/news/files/updates/update02137.html.

[5] There is identical legislation which covers Northern Ireland: http://www.opsi.gov.uk/Sr/sr2006/20060177.htm.

[6] See *Schmidt v. Spar-und Leihkasse der fruheren Amter Bordersholm, Kiel und Cronshagen ECJ [1995] ICR 237.*

[7] Such as Hungary, Sweden, France, Germany, Italy and the Netherlands.

[8] See cases such as *Spijkers v. Gebroeders Benedik Abattoir CV and anor [1986] 2 CMLR 296* and *OyLiikenne Ab v. Pekka Liskojarvi and Pentti Juntunen.*

As at the date of this article, there are no significant reported cases on New TUPE. However, inevitably, New TUPE will give rise to 'new' case law as the courts will inevitably be asked to 'fill in the gaps' where key provisions and concepts are open to interpretation. For a review of your standard documentation or specialist employment advice on your next project, please contact Ann Bevitt at abevitt@mofo.com or Suzanne Horne at shorne@mofo.com.