



BIRMINGHAM LAW SOCIETY
one profession • one region • one voice

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

11th July 2024

Response of the Employment Law Committee of the Birmingham Law Society to Consultation on clarifications to the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) and abolishing the legal framework for European Works Councils.

This response has been prepared by the Employment Law Committee of the Birmingham Law Society. The Society is the largest local law society with some 9,000 members from all branches of the legal profession and practising in all aspects of law. The response represents the collective views of the employment Law Committee whose members include specialists in employment law from all branches of the legal profession.

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

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

This decision has caused uncertainty concerning the obligations for consultation under TUPE.

In practice, when advising businesses, there will not always be clarity as to whether the workforce includes 'workers' in addition to 'employees'. The issue of employment status is not a straightforward matter. Sometimes labels are used which do not reflect the true working relationship.

Where the transfer includes 'workers' as part of the assigned workforce, it has to be highlighted that there is a risk of a claim where the worker has not been given the opportunity to elect representatives or been provided with the information and consulted on concerning the business transfer or service provision change.

This has led to some confusion for both businesses and individuals.

In relation to the individual, it might be difficult for them to understand that they do not have 'employee' protection i.e. the 'worker' would not be protected against unfair dismissal should they be dismissed as a result of the transfer. Whilst they have some rights under the Employment Rights Act 1996, they will not have 'employee' rights under the ERA such as the right to claim unfair dismissal or the right to a statutory redundancy payment.

On the other hand, they might be held to have rights to be part of the collective consultation process under TUPE as an 'employee'.

The conflicting definitions of the same key term of 'employee' are clearly unhelpful and would appear to many to create contradictions that are likely to undermine public confidence in the law.

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'?

Yes, the proposal to amend the definition of 'employee' in the TUPE regulations to bring it into line with that which is already in the Employment Rights Act 1996 will have the benefit of removing the uncertainty relating to the risk of information and consultation claims for those involved in TUPE transfers and service provision changes.

This is likely to help businesses and contractors that are involved in a business transfer or service provision change. Clarity in respect of the definition will also likely make the legislation clearer for the individuals involved.

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?

We acknowledge that this issue is finely balanced, and that convincing arguments can be made for both excluding and including limb (b) workers within this definition. There might be some advantage in simply ensuring that the definitions contained within the Employment Rights Act 1996 and TUPE are identical rather than expressly excluding one specific type of work category.

It would however appear to achieve the aim, namely to remove ambiguity, so we are broadly in favour of this proposal.

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 would appear that there would be some cost savings from the changes. The need for further enquiries in relation employment status, the further advice in respect of the legal obligations and the administrative burden of having to include a wider range of personnel in the information and consultation process all adds to the cost for a business or a contractor in the course of a business transfer or service provision change.

5. **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?**

The obligation to split employees' contracts between multiple employers where a business is transferred to more than one new business has in practice been mostly ignored.

Whilst the decision of the Court of Justice of the European Union (CJEU) in the case of *ISS Facility Services NV v Govaerts and Atalian NV* dates back to 2020, we have not come across any example of an individual actually splitting their contract of employment between different employers following a business transfer or service provision change.

Whilst it has of course been necessary to advise employers when a TUPE transfer involves multiple 'transferees' that this is an issue that needs to be considered, we are not aware of any situation where it was considered appropriate or even workable.

This is simply down to the fact that to split a contract in this way is likely to be considered highly impractical for both employers and employees.

Employees don't want to be required to work between multiple sites and have more than one employer to whom they have to report.

Similarly, employers do not want to have employees working for competitors at the same time as they are working for them. In addition, the need to assess and agree the practicalities of when the employee carries out duties for each employer would create an administrative burden and a detrimental impact on productivity.

Given these concerns, it is our experience that for commercial reasons, the change in practice dictated by the CJEU has not been followed.

6. **In your experience, how common are TUPE transfers involving multiple transferees, and what are the practical considerations that arise from these?**

These are not common transactions.

They will tend to arise in service provision changes, in circumstances where the client has decided that the existing service should be provided in a different way e.g. by reference to smaller areas.

The complications that entail by splitting the contract of employment are outlined in 5 above.

7. **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?**

The proposal to amend the TUPE regulations to clarify that an employment contract should only be transferred to one employer and should not be split between multiple employers would be welcome.

It is, however, proposed that the parties need to agree whom the employees will transfer to, which was not the generally accepted position prior to the Govaerts ruling.

It is our understanding that the principle that was established in *Kimberley Group Housing Ltd v Hambley 2008* was that where, post transfer, the activities are carried out by more than one contractor, it was the contractor that took on the greater part of the activities who inherited liability for all of the employees.

This is slightly different to the proposal now being considered whereby the new employers taking over the business or service would be required to agree who should be responsible for each employee's contract. Whilst the proposal does appear to have some advantages in that it is more likely to result in a fair outcome for the business and the employees, it does leave open the question as to how it can be resolved where no agreement is possible?

In the sale of a business, the requirement to agree liability for the future employment of specific individuals in the workforce is both commercially viable and sensible.

It would however be different in a service provision change following a tender process, which is where the fragmentation of a contract is most likely to arise. In this situation, the new employers would very likely be in competition with one another and would not easily be able to agree liabilities between themselves.

8. **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 comments above would suggest that the ruling has not been followed in practice as it is not considered to be commercially viable.

9. **Do you agree or disagree that the government should legislate to abolish the legal framework for EWCs?**

The need to continue with EWC's post-Brexit does add a layer of further layer of complexity and responsibility to facilitate consultation, and it duplicates what employers are already required to carry out under national legislation.

It seems logical for the requirement to retain EWCs to be abolished.

10. **Are there any other options the government should consider instead of abolishing the legal framework for EWCs?**

There has been a transition period and it would appear that abolition of the statutory framework for EWC's is appropriate.

Of course if a company wishes to maintain an international consultative body, it should be allowed to do so.

11. **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 costs and management time would be reduced by this measure. The need for representatives to attend meetings at an international level and also at a national company level can lead to duplication and would appear to be wasteful of resources.