

2013 No. XXXX

TERMS AND CONDITIONS OF EMPLOYMENT

**The Collective Redundancies and Transfer of Undertakings
(Protection of Employment) (Amendment) Regulations 2013**

Made - - - - - ***
Laid before Parliament ***
Coming into force - - - [January 2014]

The Secretary of State makes these Regulations in exercise of the powers conferred by section 2(2) of the European Communities Act 1972(a) and section 38 of the Employment Relations Act 1999(b).

The Secretary of State is a Minister designated for the purposes of section 2(2) of the European Communities Act 1972 in relation to measures relating to dismissals or terminations of employment contracts where such dismissals or terminations are effected by an employer for one or more reasons not related to the individual workers concerned(c) and in relation to rights and obligations relating to employers and employees on the transfer or merger of undertakings, businesses or parts of businesses(d).

Citation, commencement and extent

1.—(1) These Regulations may be cited as the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2013.

(2) These Regulations come into force on [].

(3) These Regulations do not extend to Northern Ireland.

Interpretation

2. For the purposes of these Regulations—

“the 2006 Regulations” means the Transfer of Undertakings (Protection of Employment) Regulations 2006(e);

“TUPE transfer” means—

(a) a transfer or service provision change which is a relevant transfer under the 2006 Regulations, and

(a) 1972 c.68. Section 2(2) has been amended by the Legislative and Regulatory Reform Act 2006 (c.51), s.27(1) and by the European Union (Amendment) Act 2008 (c.7), s.3(3), Schedule, Part 1.

(b) 1999 c.26. Section 38 has been amended by the Treaty of Lisbon (Changes in Terminology) Order (S.I. 2011/1043), article 6(1)(e) and (3).

(c) The European Communities (Designation) (No 4) Order 1994 (S.I. 1994/2791).

(d) The European Communities (Designation) (No 2) Order 1977 (S.I. 1977/1718).

(e) S.I. 2006/246. There are amendments to the Regulations which are not relevant to this provision.

- (b) a transfer or service provision change, not falling within sub-paragraph (a), that takes place on or after [commencement date] and is regarded by virtue of any enactment as a relevant transfer for the purposes of the 2006 Regulations; and
- “service provision change” has the same meaning as in the 2006 Regulations.

Amendment of the Trade Union and Labour Relations (Consolidation) Act 1992

3.—(1) After section 198 of the Trade Union and Labour Relations (Consolidation) Act 1992 insert—

“198A. Employees being transferred to the employer from another undertaking

- (1) This section applies where the following conditions are met—
 - (a) there is to be, or is likely to be, a relevant transfer,
 - (b) the transferee is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, and
 - (c) the employees who are to be (or are likely to be) transferred from the transferor’s to the transferee’s employment under the transfer (“transferring employees”) include one or more employees who may be affected by the proposed dismissals or by measures taken in connection with the proposed dismissals.
- (2) Where this section applies, the transferee may elect to consult, or to start to consult, representatives of affected employees, including transferring employees, about the proposed dismissals before the transfer takes place (“pre-transfer consultation”).
- (3) Any such election—
 - (a) may be made only if the transferor agrees to it, and
 - (b) must be made by way of written notice to the transferor.
- (4) If the transferee elects to carry out pre-transfer consultation—
 - (a) sections 188 to 198 apply, with the modifications set out in subsection 198B, as if the transferee were already the transferring employees’ employer and as if all the employees (including transferring employees) who may be affected by the proposed dismissals were already employed at the establishment mentioned in subsection (1)(b), and
 - (b) the transferor may provide information or other assistance to the transferee to help the transferee meet the requirements of this Chapter.
- (5) A transferee who elects to carry out pre-transfer consultation may at any time, by written notice to the transferor, cancel that election.
- (6) If the transferee cancels an election to carry out pre-transfer consultation—
 - (a) sections 188 to 198 no longer apply as mentioned in subsection (4)(a),
 - (b) anything done under those sections in reliance on the election is void, and
 - (c) if the transferee notified an appropriate representative, a transferring employee or the Secretary of State of the election or the proposed dismissals, the transferee must notify him or her of the cancellation as soon as reasonably practicable, (but this is subject to subsections (7) and (8)).
- [(7) Cancellation under subsection (5) does not prevent the transferee from making a fresh election under subsection (2) to carry out pre-transfer consultation (or from cancelling any such election under subsection (5)).]
- (8) For the purposes of this section and section 198B—
 - “pre-transfer consultation” has the meaning given in subsection (2);
 - “relevant transfer” means—

- (a) a transfer or service provision change which is a relevant transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246) Regulations, or
 - (b) a transfer or service provision change, not falling within paragraph (a), that is regarded by virtue of any enactment as a relevant transfer for the purposes of those Regulations,
- and “transferor” and “transferee” are to be construed accordingly;
“transferring employee” has the meaning given in subsection (1)(c).

198B. Section 198A: supplementary

(1) Where section 198A applies and the transferee elects to carry out pre-transfer consultation (and has not cancelled the election), the following modifications apply in relation to sections 188 to 198 so far as those sections relate to transferring employees—

- (a) in section 188(5), for “the employer” substitute “the transferor or transferee”;
- (b) in section 188(5A), for “shall allow the appropriate representatives access to the affected employees and shall afford to those representatives such accommodation and other facilities as may be appropriate” substitute “shall ensure that the appropriate representatives are allowed access to the affected employees and that such accommodation and other facilities as may be appropriate are afforded to those representatives”;
- (c) in section 188(7), at the end insert—

“A failure on the part of the transferor to provide information or other assistance to the transferee does not constitute special circumstances rendering it not reasonably practicable for the transferee to comply with such a requirement.”;
- (d) where an employment tribunal makes a protective award under section 189 ordering the transferee to pay remuneration for a protected period in respect of a transferring employee, then, so far as the protected period falls before the relevant transfer, the transferor is to be treated as the employer (and section 198A(4)(a) does not apply) for the purpose of determining under sections 190(2) to (6) and 191 the period (if any) in respect of which, and the rate at which, the employee is entitled to be paid remuneration by the transferee under section 190(1);
- (e) in section 189, at the end insert—

“(7) If on a complaint under this section a question arises whether the transferor agreed to an election or the transferee gave notice (or written notice) of an election or cancellation as required under section 198A, it is for the transferee to show that the agreement or notice (or written notice) was given as required.”;
- (f) in section 192, at the end insert—

“(5) If on a complaint under this section a question arises whether the transferor agreed to an election or the transferee gave notice (or written notice) of an election or cancellation as required under section 198A, it is for the transferee to show that the agreement or notice (or written notice) was given as required.”;
- (g) in section 193(6), for “the employer” the second time it appears substitute “the transferor or transferee”;
- (h) in section 193(7), at the end insert—

“A failure on the part of the transferor to provide information or other assistance to the transferee does not constitute special circumstances rendering it not reasonably practicable for the transferee to comply with any of those requirements.”;

- (i) in section 196(1), for the words “they are employed by the employer at the time when they are elected or appointed” substitute “, if they are elected or appointed before the relevant transfer they are employed by the transferor at the time when they are elected or appointed, and if they are elected or appointed after the relevant transfer they are employed by the transferee at the time when they are elected or appointed.””

(2) [Any other consequential amendments or modifications...]

(3) [In section 188(8) of the Trade Union and Labour Relations (Consolidation) Act 1992, after “This section” insert “(including as applied by virtue of sections 198A and 198B)”.]

Amendment of the Transfer of Undertakings (Protection of Employment) Regulations 2006 Regulations

4. The 2006 Regulations are amended as set out in regulations 5 to 11.

Meaning of “activities”

5.—(1) In regulation 3 (a relevant transfer), after paragraph (2) insert—

“(2A) “References in paragraph (1)(b) to activities being carried out instead by another person are to activities which are fundamentally the same as the activities carried out previously.”.

(2) The amendment made by paragraph (1) applies in relation to a TUPE transfer which takes place on or after [insert commencement date].

Restrictions on varying contracts

6.—(1) In regulation 4 (effect of relevant transfer on contracts of employment), for paragraphs (4) and (5) substitute—

“(4) Subject to regulation 9, any purported variation of a contract of employment that is, or will be, transferred by paragraph (1), is void if the reason for the variation is the transfer.

(5) Paragraph (4) does not prevent a variation to the contract of employment—

- (a) if the reason for the variation is an economic, technical or organisational reason entailing changes in the workforce; or
- (b) if the reason for the variation is the transfer, provided that the terms of that contract permit the employer to make such a variation.

(5A) In paragraph (5), the expression “changes in the workforce” includes a change to the place (within the meaning of section 139 of the 1996 Act) where employees are employed by the employer to carry on the business of the employer or to carry out work of a particular kind for the employer.

(5B) Paragraph (4) does not apply in respect of a variation of contract in so far as it varies a term or condition incorporated from a collective agreement, provided that—

- (a) the variation of the contract takes effect on a date more than one year after the date of the transfer; and
- (b) following that variation, the rights and obligations in the employee’s contract, when considered together, are no less favourable to the employee than those which applied immediately before the variation.

(5C) Paragraphs (5) and (5B) do not affect any rule of law as to when a contract of employment is effectively varied.”.

(2) The amendment made by paragraph (1), applies in relation to any purported variation of contract that is transferred by a TUPE transfer if-

- (a) that purported variation is agreed on or after [commencement date], and
- (b) that TUPE transfer takes place on or after [commencement date].

Effect of relevant transfer on contracts of employment which incorporate provisions of collective agreements

7.—(1) After regulation 4, insert—

“Effect of relevant transfer on contracts of employment which incorporate provisions of collective agreements

4A.—(1) Where a contract of employment incorporates provisions of collective agreements as may be agreed from time to time, regulation 4(2) does not transfer any rights, powers, duties and liabilities in relation to any provision of a collective agreement if the following conditions are met—

- (a) the provision of the collective agreement is agreed and comes into force after the date of the transfer; and
- (b) the transferee is not a participant to the collective bargaining for that provision.

(2) For the purposes of regulation 4(1), the contract of employment has effect after the transfer as if it does not incorporate provisions of a collective agreement which meets the conditions in paragraph (1).”.

(2) The amendment made by paragraph (1) applies in relation to a TUPE transfer which takes place on or after [the commencement date].

Dismissal of employee because of a relevant transfer

8.—(1) In regulation 7 (dismissal of employee because of relevant transfer), for paragraphs (1) to (3) substitute—

“(1) Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee is to be treated for the purposes of Part X of the 1996 Act (unfair dismissal) as unfairly dismissed if the reason for the dismissal is the transfer.

(2) Paragraph (1) does not apply to dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce of either the transferor or transferee before or after a relevant transfer.

(3) If a dismissal takes place for a reason referred to in paragraph (2), without prejudice to the application of section 98(4) of the 1996 Act (test of fair dismissal), for the purposes of sections 98(1) and 135 of that Act (reason for dismissal)—

(a) the dismissal is regarded as having been for redundancy where section 98(2)(c) of that Act applies; or

(b) in any other case, the dismissal is regarded as having been for a substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held.

(3A) In paragraph (2), the expression “changes in the workforce” includes a change to the place (within the meaning of section 139 of the 1996 Act) where employees are employed by the employer to carry on the business of the employer or to carry out work of a particular kind for the employer.”.

(2) The amendment made by paragraph (1) applies in relation to any case where—

- (a) the TUPE transfer takes place on or after [commencement date], and
- (b) the notice given by an employer in respect of any dismissal is on or after [commencement date], or in a case where no notice is given, the effective date of termination in respect of any dismissal is on or after [commencement date].

(3) In paragraph (2), “effective date of termination” has the same meaning as in section 97 of the Employment Rights Act 1996(a).

(a) c.18. Section 97 has been amended by the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (S.I. 2002/2034), reg 11, Sch 2, para 3(1), (8), except that those amendments do not apply to the cases excluded from

Definition of “permitted variation”

9.—(1) In regulation 9(7) (variations of contract where transferors are subject to relevant insolvency proceedings), for sub-paragraph (a), substitute—

“(a) the reason for the variation is the transfer and not one of the reasons referred to in regulation 4(5); and”.

(2) The amendment made by paragraph (1) applies in relation to any case where—

- (a) the TUPE transfer takes place on or after [commencement date], and
- (b) the permitted variation is agreed on or after [commencement date].

Deadline for notification of employee liability information

10.—(1) In regulation 11(6)(a) (notification of employee liability information), for “fourteen days” substitute “28 days”.

(2) The amendment made by paragraph (1) applies in relation to a TUPE transfer which takes place on or after [date which is 3 months after commencement].

Micro-business’s duty to inform and consult where no appropriate representatives

11.—(1) In regulation 13(1)(b) (duty to inform and consult representatives) after “regulations” insert “13A”.

(2) After regulation 13 insert—

“Micro-business’s duty to inform and consult where no appropriate representatives

13A.—(1) This regulation applies if, at the time when the employer is required to give information under regulation 13(2)—

- (a) the employer employs fewer than 10 employees;
- (b) there are no appropriate representatives within the meaning of regulation 13(3); and
- (c) the employer has not invited any of the affected employees to elect employee representatives.

(2) The employer may comply with regulation 13 by performing any duty which relates to appropriate representatives as if each of the affected employees were an appropriate representative.”.

(3) — In regulation 15 (failure to inform or consult), in paragraph (3) after “employees” insert “except where the question is whether or not regulation 13A applied”.

(4) In regulation 15 (failure to inform or consult), after paragraph (3) insert:

“(3A) If on a complaint under paragraph (1), a question arises as to whether or not regulation 13A applied, it is for the employer to show that it did.”.

(5) The amendments made by this regulation apply in relation to a TUPE transfer which takes place on or after [date which is 6 months after commencement date].

Consequential amendments

12.—[to insert any necessary amendments to other enactments which are necessary in consequence of the above amendments.]

the 2002 Regulations by regulations 18 – 20; and by the Employment Relations Act 1999 (c.26), ss 9, 44, Sch 4, Part 3, paras 5, 14, Sch 9(2).

- (a) Regulation 11(2) has been amended by the Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2009 (S.I. 2009/592), reg 2(1) and (2).
- (b) Regulation 13 has been amended by the Agency Workers Regulations 2010 (S.I. 2010/93), reg 25, Sch 2, Part 2, paras 28, 29.

Date

Minister of State ...
Department for Business, Innovation and Skills

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations relate to the implementation of Council Directive 1998/59/EC on the approximation of the laws of the Member States relating to collective redundancies. They insert new sections into the provisions relating to collective redundancies in the Trade Union and Labour Relations (Consolidation) Act 1992 (“the 1992 Act”).

They also relate to the implementation of Council Directive 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. They amend the Transfer of Undertakings (Protection of Employment) Regulations 2006 (“the 2006 Regulations”).

Regulation 3 inserts new sections into the 1992 Act. Section 198A will allow a transferee who is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, to elect to consult, or to start to consult, about the proposed dismissals before the transfer takes place. This will only be possible where the transferor agrees to such pre-transfer consultation.

Regulation 5 inserts a new paragraph into regulation 3 of the 2006 Regulations, dealing with the meaning of “activities” in the definition of a service provision change in regulation 3(1)(b).

Regulation 6 amends regulation 4 of the 2006 Regulations to replace the current restrictions concerning variations to contracts in a situation involving a relevant transfer. Any purported variation of a contract of employment that will be transferred under regulation 4(1) of the 2006 Regulations will be void if the reason for the variation is the transfer. However, in certain situations, dealt with in the new paragraphs (5) to (5B), a variation of contract may not be void, though the general rules as to when a contract is effectively varied continue to apply. Regulation 9 makes a related amendment to the definition of “permitted variation” in regulation 9 of the 2006 Regulations, so that it accords with these amendments to regulation 4.

Regulation 7 inserts regulation 4A into the 2006 Regulations, to provide that if a contract of employment incorporates provisions of collective agreements as may be agreed from time to time, rights in relation to such collective agreements which are agreed and come into force after the date of the transfer do not transfer under regulation 4 of the 2006 Regulations if the transferee is not a party to the collective bargaining for them.

Regulation 8 amends regulation 7 of the 2006 Regulations on the protection against dismissal in situations involving a relevant transfer. If the reason for the dismissal of an employee is the transfer, the dismissal is treated as unfair for the purposes of Part X of the Employment Rights Act 1996 (unfair dismissal). This does not apply in respect of dismissals which may take place for economic, technical or organisational reasons entailing changes in the workforce of either the transferor or transferee before or after a relevant transfer.

Regulation 10 amends regulation 11 of the 2006 Regulations so that the usual deadline for notification of employee information under that regulation is increased from not less than 14 days before the transfer to not less than 28 days before the transfer.

Regulations 11 makes amendments to the regulations 13 to 15 of the 2006 Regulations on information and consultation so that a micro-business can inform and consult directly with all the affected employees in cases where there are no existing appropriate representatives.

Regulation 12 makes consequential amendments to other enactments.

An impact assessment of the effect that this instrument will have on the costs to business and the voluntary sector is attached to the Explanatory Memorandum which is available alongside the instrument on www.legislation.gov.uk. Copies have also been placed in the Libraries of both Houses of Parliament.