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INFORMATION NOTE NO.6

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**TRANSFER OF UNDERTAKINGS (PROTECTION OF EMPLOYMENT)
REGULATIONS 2006 AND THE SERVICE PROVISION CHANGE (PROTECTION OF
EMPLOYMENT) REGULATIONS (NORTHERN IRELAND) 2006**

The Transfer of Undertakings (Protection of Employment) and Service Provision Change Regulations (known as TUPE) give effect to an EC Directive on safeguarding employees' rights when the business they are working for is transferred to a new employer. The Regulations also protect the interests of Trade Unions affected by the transfer. The Regulations apply to Northern Ireland and came into operation on 6 April 2006.

1. SUMMARY OF MAIN PROVISIONS OF THE REGULATIONS

The main purpose of the Regulations is to protect the rights of employees who are employed in a business that is being transferred under the Regulations so that their contracts of employment are not subjected to unlawful termination or change. The remainder of this Information Note sets out the main provisions of the Regulations. Further information or advice may be obtained from the Labour Relations Agency general enquiry service.

2. TRANSFERS COVERED BY THE REGULATIONS

The TUPE Regulations will only apply where there is a **relevant transfer** from one employer (transferor) to another employer (transferee) and is defined as "*the transfer of an undertaking or business or part of an undertaking or business which is located within the United Kingdom to another person.*"

TUPE applies if there is a **relevant transfer** in the following circumstances:

- there is a transfer of an **economic entity** which is "*an organised grouping of resources*

which has the objective of pursuing an **economic activity**” and which **retains its identity**; and/or

- there is a **service provision change**. There will be a service provision change if an employer either:
 - contracts out certain services; or
 - ends a contract with one contractor to carry out certain activities and transfers it to another contractor; or
 - brings certain activities in-house.

Examples of transfer situations where TUPE Regulations are likely* to apply are:

- sale of the whole or part of a business where the business continues in a similar format;
- merger of two businesses;
- transfer of a lease;
- transfer of a cleaning contract from one contractor to another;
- outsourcing of a catering service to a contractor;
- transfer of a transport service from a contractor to the client company.

Examples of transfer situations where TUPE Regulations are unlikely* to apply are:

- transfer by share takeover as the company remains in existence and does not result in a legal change of employer;
- transfer of assets only, e.g., sale of equipment alone;
- transfer of companies located outside the United Kingdom;
- administrative re-organisation of public authorities, or the transfer of administrative functions between public authorities.

**The examples listed above are based on previous case law. An Industrial Tribunal will ultimately decide whether the Regulations apply or not.*

3 OUTLINE OF MAIN PROVISIONS

3.1 Contracts of employment

Continuity of employment

When a transfer covered by the Regulations takes place, the contracts of employment of all the employees and the rights and obligations arising from those contracts are automatically taken over by the new employer (transferee). Therefore, the contract is not terminated but treated as if it were originally made between the new employer and the employee concerned and continuity of employment is preserved for both contractual and statutory purposes e.g., for calculating length of service for notice or redundancy payments.

The only obligations which do not transfer are criminal liabilities and provisions of an occupational pension scheme which relate to benefits for old age, invalidity or survivors.

Variation of contract

The new employer (transferee) is not permitted to make amendments to the terms and conditions of employment because of the transfer of the undertaking and any such amendments will be deemed void. However, the Regulations do permit employers and employees to agree to variations when the reason for variation is *“a reason connected to the transfer that is an economic, technical or organisational reason entailing changes in the workforce”* or for a reason unconnected with the transfer.

→ See also Employment Rights Booklet 2 *“Written statement of employment particulars”* at <http://www.delni.gov.uk/index/publications/pubs-employment-rights/erbooklets/written-statement-of-employment-particulars.htm>

If an employee believes that the transfer involves or would involve a **substantial change in working conditions to their material detriment** the Regulations permit the employee to resign and submit a claim of unfair dismissal (provided they have 12 months continuous service) to the Industrial Tribunal on the grounds that the employer’s actions constitute or would constitute a termination of their employment.

An employee also has a common law right to claim constructive (unfair) dismissal (provided they have 12 months’ continuous service) for a fundamental breach of contract.

For information on fair, unfair and constructive dismissal

→ See Employment Rights Booklet 13 *“Unfairly dismissed?”* at <http://www.delni.gov.uk/index/publications/pubs-employment-rights/erbooklets/unfairly-dismissed.htm>

Occupational Pension Schemes

Rights under an Occupational Pension Scheme relating to benefits for old age, invalidity or survivors do not transfer. An employee is not permitted to bring a claim for breach of contract or constructive unfair dismissal arising out of a loss or reduction in his rights under such a Scheme. Pension rights which have been earned up to the time of transfer are protected by existing Social Security legislation and Pension Trust arrangements. The Regulations do not impose any obligation upon the new employer to continue with a pension scheme. However, The Pensions (Northern Ireland) Order 2005 and The Transfer of Employment (Pensions Protection) Regulations (Northern Ireland) 2005 provide limited protection where the old employer provided a pension scheme then the new employer must provide some form of pension scheme for those employees who were members or were eligible to join.

→ Specialist pension advice should be sought. Contact Occupational Pensions Advisory Service (OPAS) on 0845 60112923 or at www.opas.org.uk

3.2 Dismissal Rights

If an employee is dismissed, either before or after a transfer covered by the Regulations, the dismissal will be regarded as automatically unfair if the transfer is the principal reason for the dismissal. However, a dismissal will not necessarily be considered unfair if it is carried out by either the old or new employer for an *“economic, technical or organisational reason entailing changes in the workforce”* because of the transfer. In this instance an employer must satisfy the Industrial Tribunal that they acted reasonably in dismissing for this reason.

Employees who do not wish to transfer to the new employer have the right to object to the transfer. In this situation the employee's objection will result in termination of their employment without dismissal (i.e. it is viewed as a resignation) and without giving notice. In general, the need to reduce the workforce for an economic, technical or organisational reason may amount to a redundancy situation. The employer will be required to consult with the affected employees and, where appropriate, pay redundancy payments. An employer may also be required to comply with the Employment (Northern Ireland) Order 2003 (Dispute Resolution) Regulations (Northern Ireland) 2004 requiring them to follow a minimum three-step dismissal procedure when terminating an employee's contract of employment. In selecting employees for redundancy for an economic, technical or organisational reason the new employer (transferee) must include both existing and transferred employees in the selection pool. When an employee believes they have been unfairly selected for redundancy they may challenge this as an unfair dismissal provided they have at least 12 months' continuous service.

Where an employee is dismissed by the old employer prior to the transfer taking effect and the reason is unconnected to the transfer or is for an economic, technical or organisational reason then the liability for the unfair dismissal will remain with the old employer and will not transfer to the new employer.

→ See LRA *Code of Practice on Disciplinary and Grievance Procedures and Redundancy Consultation and Procedures* at www.lra.org.uk/publications and Statutory Dispute Resolution Procedures at www.delni.gov.uk/resolvingdisputes for information on three-step dismissal procedure

3.3 Insolvent businesses

The Regulations includes special provisions which apply in situations where a business is failing and the old employer is subject to insolvency proceedings. The aim of these provisions is to assist in rescuing the business and ensuring employees' job security. The provisions protect the new employer (transferee) from liability for any debts to employees, such as redundancy payments, arrears of pay, payment in lieu of notice, holiday pay, etc. These debts may be met by the Redundancy Payments Service.

→ See Employment Rights Booklet 3 "*Redundancy payments*" at <http://www.delni.gov.uk/index/publications/pubs-employment-rights/erbooklets/redundancy-payments.htm> and Employment Rights Booklet 5 "*Your rights if your employer is insolvent*" at <http://www.delni.gov.uk/index/publications/pubs-employment-rights/erbooklets/your-rights-if-your-employer-is-insolvent.htm>

The Regulations also give the new employer (transferee) an opportunity to vary the terms and conditions of employees following the transfer. For such variations to be lawful they must be agreed between the employee representatives (e. g. Trade Union representatives) and either the old employer, the new employer or the insolvency practitioner. Where the representatives are not Union representatives the old employer, the new employer or the insolvency practitioner must get agreement to vary terms and conditions with employee representatives (who are specially elected for this purpose) and a copy of the agreement, before it is signed, should be issued to all affected employees with any guidance necessary to assist their understanding. The permitted variations must not breach any statutory entitlements, e. g. National Minimum Wage rates and must only be made with the intention

of safeguarding employment opportunities and ensuring the survival of the business.

3.4 Trade Union recognition and collective agreements

A collective agreement (an arrangement whereby the Trade Union negotiates with the employer on pay, hours and holiday rights, etc) made with a recognised Union and the old employer which is in existence at the time of the transfer will automatically transfer to the new employer.

A recognition agreement (an arrangement whereby an employer agrees to conduct collective bargaining with a specific Trade Union(s) on behalf of employees) made with a Union and the old employer also transfers where the business or part of the business that transfers maintains a separate identity to the new employer's organisation. Where the business does not keep its separate identity, (i.e. is simply absorbed within the transferee's undertaking) the previous Trade Union recognition lapses and it will then be up to the Union and employer to re-negotiate recognition. Therefore, it is in a Trade Union's interest to use the consultation period to get agreement concerning recognition following the transfer.

4. INFORMATION AND CONSULTATION REQUIREMENTS

4.1 Requirement for transferor employer to provide information to transferee employer

The old employer (transferor) has an obligation to provide the new employer (transferee) with information about the employees to enable him to understand the rights, duties and obligations in relation to those employees who will be transferred. This information should be made available in writing or a readily accessible form and should include:

- identity and age of employees;
- terms and conditions of employment as laid down in the written statement of employment particulars;
- details of any disciplinary/grievance action taken within the previous two years where the Employment (NI) Order 2003 (Dispute Resolution) Regulations 2004 apply (the Statutory Dispute Resolution Procedures);
- details of any legal action brought against the old employer within the previous two years or any potential legal action which the old employer believes may be brought;
- information of any collective agreements which apply to the employees to be transferred.

This information may be provided in instalments or through a third party to the new employer and must be provided **at least two weeks** before the completion of the transfer. Any amendments to this information which occur before the transfer takes place must be provided to the new employer in writing.

If the old employer fails to provide this information, the new employer may lodge a claim to the Industrial Tribunal within three months of the date of the transfer. If the Tribunal finds this claim to be well-founded they may make a declaration to that effect and award compensation to the new employer of no less than £500 per employee in respect of whom the old employer has failed to provide information.

4.2 Consultation requirements

The Regulations place a duty on both the old and new employer to inform and consult employee representatives of the employees who may be affected by the transfer. This includes those employees who will and will not be transferred but whose jobs are likely to be affected by the transfer.

Employee representatives include representatives of an independent Trade Union who are recognised by the employer or other non-union representatives; in the absence of a recognised Trade Union the employer is obliged to facilitate the election of representatives for this purpose.

To enable consultation to take place between the employer and the employee representatives, the employer should inform those representatives long enough before a relevant transfer of:

- the fact of, date of and reason for the transfer;
- the legal, economic and social implications of the transfer for the affected employees; and
- any action the employer intends to take, e.g. re-organisation, in connection with the transfer in relation to the affected employees so that consultations between the employer and the employee representatives can take place.

When the old employer is required to give the information they must also disclose the measures which the new employer intends to take; the new employer must give the old employer the necessary information so that the old employer is able to meet the requirement. If no measures are envisaged, employee representatives must be informed of this, but need not be consulted about the transfer.

If there are special circumstances which make it impracticable for the employer (old or new) to fulfil the information or consultation requirement, the employer must take such steps to meet the requirement as are reasonably practicable in the circumstances. Where an employer has failed to consult with employee representatives complaints may be lodged (within three months of the date of the transfer) to the Industrial Tribunal by the Trade Union representatives, elected employee representatives or, in the absence of any representatives, by the employees affected by the transfer.

5. Role of the Labour Relations Agency

The Labour Relations Agency can provide assistance to the parties involved in a transfer through the provision of confidential information and advice and, in the event of complaints being made to an Industrial Tribunal a conciliation service.

→ See LRA website for further information on services provided at www.lra.org.uk

Contact details are as follows:

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