GUIDANCE ON NEW CHALLENGES TO TUPE TERMS & CONDITIONS

Introduction

Amendments made to the TUPE Regulations last year are set to throw up new possible challenges by employers to terms and conditions for staff who have transferred under TUPE. This guidance sets out the legal position on attempts to change terms and conditions under the revised regulations before going on to consider the bargaining issues and organising considerations that these challenges present.

Legal implications for collective agreements following a TUPE transfer

Following the amendments to the TUPE Regulations which came into force on 31 January 2014, regulation 4(5B) of TUPE permits a transferee employer to seek agreement to vary terms and conditions incorporated into individual contracts that are from a collective agreement a year after the transfer.

This means that a year after transfer the new employer can amend / vary collectively agreed terms and conditions whether or not it is because of the transfer and even if there is no economic technical or organisational reason (“ETO reason”) entailing changes in the workforce.

On the other hand, individual terms and conditions (those not derived from a collective agreement) can only be changed if it has nothing to do with the transfer or if there is an ETO reason entailing changes in the workforce.

Variation of terms and conditions may only take place with the agreement of the individual employee (i.e. not the trade union).

However, changes to contracts that are from a collective agreement can only take place if the terms overall are no less favourable than their current terms. This means that some terms can be less favourable as long as some are more favourable and considered altogether the previous terms and conditions and the current terms and conditions balance out. This will be a very difficult exercise in practice and branch and regional trade union officials should seek legal advice from UNISON Legal Services if this situation arises (see details below).

The new regulations create a two–tier system of contractual rights. Those terms and conditions that arise out of an individual contract of employment will have greater protection from variation under TUPE than those that derive from collective agreements.
In addition to the amended TUPE regulations, the three pieces of legislation set out below are often quoted as being of relevance to proposed changes to terms and conditions and the following section goes on to assess their value in challenging employer proposals.

- Section 145B of the Trade Union and Labour Relations (Consolidation) Act
- Article 11 of the Human Rights Act
- European Union’s Acquired Rights Directive

Section 145B of the Trade Union and Labour Relations (Consolidation) Act prohibits an employer from making offers to workers for the purpose of ensuring that terms of employment are no longer determined by collective agreement negotiated by or on behalf of the union.

The key test for whether a challenge can be made under Section 145B is as follows:

- Is the employer making an offer (this could be an offer of a sum of money, or just an offer) in an attempt to dismantle collective bargaining arrangements for one or all terms and conditions?

The key points to note are:

- In order to be successful, a tribunal will have to be convinced that the employer’s sole or main purpose in making the offer is to get out of collective bargaining in relation to a term or condition of an employee’s contract. If so, there is a good chance that the proposal can be challenged under Section 145B. An example of a successful case based on this legislation is set out below.
- It is for the employer to prove to the employment tribunal that the offer was not being made for the sole or main purpose of getting out of collective bargaining. A tribunal will consider if the employer changed or did not want to use the normal arrangements or any proposed arrangements for collective bargaining. Employees who are rewarded for high levels of performance or were given retention awards will not fall within this section.
Article 11 of the Human Rights Act protects the right to freedom of association. However, on the issue of collective bargaining it may not provide any additional protection to that set out in Section 145B of the Trade Union and Labour Relations (Consolidation) Act.

The European Union’s Acquired Rights Directive sets out EU law on safeguarding of employees’ rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses. However, the directive already allows national law to amend TUPE protected agreements after one year. Prior to the TUPE amendments introduced in 2014, UK TUPE regulations provided additional protection, but the amendments brought UK law in line with directive. Therefore, the directive does not provide any extra protection against the new TUPE regulations in relation to contract variations or dismissals.

When might a legal challenge be possible?

In summary, a challenge to proposed changes in terms and conditions may be possible in the following cases:

1) For individual contracts, where the changes can be shown to be because of the transfer and there is no valid economic technical or organisational reason for the changes entailing changes in the workforce or the terms of the contract do not permit such a variation.

2) For contracts deriving from a collective agreement, where the employer has failed to allow a year to pass since the transfer took place (and the defences set out in point one above do not exist);

3) For contracts deriving from a collective agreement, where the new terms and conditions are less favourable as a complete package than the previous terms and conditions;

Example of successful defence

UNISON brought a case against the London Borough of Bromley in July 2014. The case centred on offers to UNISON members that gave effect to a 2012 council decision to withdraw from national (NJC) and regional (GLPC) pay bargaining. Bromley wanted to control the pay setting process completely and was expressly unhappy with the delays encountered in the NJC collective bargaining process.

The series of offers made by Bromley asked employees to vary their employment contracts and agree to a localised pay setting process which replaced national and regional collective agreements with future pay awards determined solely by the Full Council. Most of the employees agreed. However, this case was bought by a number who did not and who were ultimately dismissed and re-engaged on new terms of employment that included the localised pay setting process.

The council conceded everything in this case except the issue of whether or not the offers were made for the prohibited purpose of getting out of collective bargaining.

The employment tribunal found in the claimants’ favour. They held that the council had made a series of similar offers, the effect of which was for the prohibited purpose that the claimants’ terms and conditions of employment (in particular pay) were no longer determined by collective agreement. It awarded each of the claimants’ compensation of £3600 for breaches of section 145B (this is a fixed penalty per claimant).
4) Where the employer can be shown to be making offers in an attempt to dismantle collective bargaining arrangements for one or all of an employee’s terms and conditions.

**Key timescales for challenges**

Please note that the time available for a challenge under s.145B Trade Union and Labour Relations (Consolidation) Act 1992 to proposed changes to terms and conditions runs from the date the offer is made. For example, if a TUPE transfer takes place on 1 February 2014, and the new employer seeks to vary collectively agreed terms and conditions on 1 February 2015 by making an offer on 1 February 2015, the limitation deadline for claims is 30 April 2015.

Where unlawful changes have been made to a person’s contract following a TUPE transfer, an individual can also bring a claim for an unlawful deduction of wages. The deadline will be ongoing if the deductions are ongoing, but from July 2015 backpay will be limited to two years.

Any attempt to enforce new terms and conditions (by dismissing and re-engaging) is also likely to trigger the information and consultation requirements of section 188 in the Trade Union and Labour Relations (Consolidation) Act 1992, This is a claim that would be brought by UNISON within 3 months of the first dismissals (albeit, the employees are then re-engaged).

- Please contact Shantha David, at UNISON Legal Services, on s.david@unison.co.uk if you require advice in relation to the legal matters set out above, or if you are aware of any cases.
Bargaining checklist

In the event that an employer comes forward with a proposal to alter the terms and conditions of staff who have previously been transferred to them under the TUPE Regulations, the following points will be key to achieving the best outcome for members.

- Check that the proposals meet the time criteria of the TUPE amendments – ie at least a year has elapsed since the TUPE transfer.
- Determine whether the proposals are to change a collective agreement, individual terms and conditions (which have not been derived from a collective agreement) or a combination of the two.
- Where the proposals are to change individual terms and conditions, determine whether the proposals fulfil the criteria that the changes have nothing to do with the transfer or there is an "economic, technical or organisational reason" (ETO) entailing changes in the workforce. The UNISON TUPE Branch Guidance provides examples of ETO cases (pages 26 and 27) and expert advice can be obtained through your regional officer.
- Where the proposals are to change collective terms and conditions, gather information on the detail of the proposed terms to test whether they meet the criteria of being no less favourable than current terms overall. Concerns can be put to the employer, raised with the individual employees affected and ultimately used to challenge proposals that are judged to negative impact overall.
- Where the proposals are to change collective terms and conditions, a legal challenge can be possible in specific cases where it can be shown that the employer is making offers to try to disband any aspect of collective bargaining arrangements. Expert advice should be sought through your regional officer.
- Particularly in cases where proposals will create a more divided “two-tier” workforce, negotiators should emphasise to employers the damage caused to morale, recruitment, retention and standards of service by imposing different terms and conditions on staff doing the same job.
- Where there is no basis to challenge the legality of proposals, UNISON produces a wide array advice on norms for pay, terms and conditions to assist negotiations that can be obtained at in-depth guides For more specific advice, contact the Bargaining Support Group at bsg@unison.co.uk
- The amendments to the TUPE legislation which have opened up these greater opportunities for employers to pursue changes in terms and conditions emphasise the even greater importance the union must attach to securing commitment to a collective agreement by the company taking over a contract when any TUPE transfer first takes place.
- As always, bargaining strength over terms and conditions is heavily influenced by the effectiveness of UNISON’s organisation in the workplace. This issue is considered in the next section.
Organising checklist

Timing is essential, as soon as it becomes clear that the employer is seeking to change terms and conditions, activists and organisers need to start talking to workers. Those workers who aren’t already in UNISON should be encouraged to join; existing members should be encouraged to get active. Talking to people once terms and conditions have been changed is likely to be less effective.

- Organising is about talking to workers. To be effective in organising you need to know which workers are affected, where they work and when the changes are planned for; so that discussions can be planned to be timely and with the right people.

- Campaigning should always be used to make new contacts, identify and recruit potential activists and recruit members. Continuing to build our activist base amongst contracted out members, and ensuring that they are integrated into the branch and negotiating structures, is the only way to ensure sustainable organisation.

- In order to identify potential leaders, you need to give people a chance to contribute to discussions. Whether you hold a group meeting or simply visit workplaces, try to leave time to go and speak directly with people who show a particular interest.

- Workers are much more likely to join an organisation that they can see is being active on their behalf, particularly if that organisation is achieving results, and they can see that by joining they will make it even more effective. Communication is the key to good organising. Workers need to know what we are doing on behalf of our members, and should be reminded that by joining they can help make us even more effective.

- For more detail on UNISON organising, check out UNISON’s new online Organising Space. Any activist registered on MyUNISON can log in here: https://organisingspace.unison.org.uk