

2014 No. 16

TERMS AND CONDITIONS OF EMPLOYMENT

**The Collective Redundancies and Transfer of Undertakings
(Protection of Employment) (Amendment) Regulations 2014**

<i>Made</i> - - - -	<i>8th January 2014</i>
<i>Laid before Parliament</i>	<i>10th January 2014</i>
<i>Coming into force</i> - -	<i>31st January 2014</i>

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 2014.

(2) These Regulations come into force on 31st January 2014.

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

Interpretation

2. For the purposes of these Regulations—

“TUPE transfer” means—

(a) a relevant transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006(e), or

(b) anything else regarded, by virtue of an enactment, as a relevant transfer for the purposes of those Regulations.

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

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

3.—(1) In Chapter 2 of Part 4 of the Trade Union and Labour Relations (Consolidation) Act 1992(a) (industrial relations: procedure for handling redundancies), after section 198 insert—

“Employees being transferred to the employer from another undertaking

198A.—(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 individuals who work for the transferor and who are to be (or are likely to be) transferred to the transferee’s employment under the transfer (“transferring individuals”) include one or more individuals 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 transferring individuals 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 from the time of the election (and continue to apply after the transfer) as if the transferee were already the transferring individuals’ employer and as if any transferring individuals who may be affected by the proposed dismissals were already employed at the establishment mentioned in subsection (1)(b) (but this is subject to section 198B), 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 cancel that election at any time by written notice to the transferor.

(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 has no effect so far as it was done in reliance on the election,
- (c) if the transferee notified an appropriate representative, a transferring individual 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, and
- (d) the transferee may not make another election under subsection (2) in relation to the proposed dismissals.

(7) For the purposes of this section and section 198B—

(a) 1992 c.52. The main relevant amendments to Chapter 2 of Part 4 are: the Trade Union Reform and Employment Rights Act 1993 (c.19), sections 34 and 49(2) and Schedule 8 paragraphs 70 and 71; the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995, (S.I. 1995/2587), regulations 3, 4, 5 and 6; the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1999 (S.I. 1999/1925), regulations 3 to 6; the Collective Redundancies (Amendment) Regulations 2006 (S.I. 2006/2387), regulation 3; the Agency Workers Regulations 2010 (S.I. 2010/93), regulation 25, Schedule 2, Part 1, paragraphs 1 and 4; the Trade Union and Labour Relations (Consolidation) Act 1992 (Amendment) Order 2013 (S.I. 2013/763), article 3; and the Enterprise and Regulatory Reform Act 2013 (c.24), section 8, Schedule 2, paragraphs 1, 11 and 12.

“affected transferring individual” means a transferring individual who may be affected by the proposed dismissals or who may be affected by measures taken in connection with the proposed dismissals;

“pre-transfer consultation” has the meaning given in subsection (2);

“relevant transfer” means—

- (a) a relevant transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006(a),
- (b) anything else regarded, by virtue of an enactment, as a relevant transfer for the purposes of those Regulations, or
- (c) where an enactment provides a power to make provision which is the same as or similar to those Regulations, any other novation of a contract of employment effected in the exercise of that power,

and “transferor” and “transferee” are to be construed accordingly;

“transferring individual” has the meaning given in subsection (1)(c).

Section 198A: supplementary

198B.—(1) Where section 198A applies and the transferee elects to carry out pre-transfer consultation (and has not cancelled the election), the application under section 198A(4)(a) of sections 188 to 198 is (both before and after the transfer) subject to the following modifications—

- (a) for section 188(1B)(a) substitute—

“(a) for transferring individuals of a description in respect of which an independent trade union is recognised by the transferor, representatives of that trade union,

(aa) for employees, other than transferring individuals, of a description in respect of which an independent trade union is recognised by the transferee, representatives of that trade union, or”;

- (b) in section 188(5), for “the employer” substitute “the transferor or transferee”;
- (c) 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 transferring individuals and that such accommodation and other facilities as may be appropriate are afforded to those representatives”;
- (d) 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.”;
- (e) 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 individual, then, so far as the protected period falls before the relevant transfer, the individual’s employer before the transfer is to be treated as the employer 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 individual is entitled to be paid remuneration by the transferee under section 190(1);
- (f) in section 189, at the end insert—

(a) S.I. 2006/246.

“(7) If on a complaint under this section a question arises whether the transferor agreed to an election or the transferee gave notice of an election as required under section 198A(3), it is for the transferee to show that the agreement or notice was given as required.”;

(g) 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 of an election as required under section 198A(3), it is for the transferee to show that the agreement or notice was given as required.”;

(h) in section 193(6), for “the employer” the second time it appears substitute “the transferor or transferee”;

(i) 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.”;

(j) in section 196(1), in the closing words, for “employed by the employer” substitute “employed by the transferor or transferee”;

(k) for section 196(2) substitute—

“(2) References in this Chapter to representatives of a trade union are to officials or other persons authorised by the trade union to carry on collective bargaining with the transferee.”.

(2) Where section 198A applies and the transferee elects to carry out pre-transfer consultation (and has not cancelled the election), both before and after the transfer section 168(1)(c) applies as follows in relation to an official of an independent trade union who, as such an official, is an affected transferring individual’s appropriate representative under section 188(1B)(a)—

(a) in relation to the official’s duties as such a representative, the reference in the opening words of section 168(1) to an independent trade union being recognised by the employer is to be read as a reference to an independent trade union being recognised by the transferor;

(b) the references in section 168(1)(c) to the employer in relation to section 188 are to be read as references to the transferee.”.

(2) In section 299 of the Trade Union and Labour Relations (Consolidation) Act 1992(a) (index of defined expressions)—

(a) After the entry for “affected employees” insert—

““affected transferring individual” (in sections 198A and 198B) section 198A(7)”;

(b) after the entry for “president” insert—

““pre-transfer consultation” (in sections 198A and 198B) section 198A(7)”;

(c) after the entry for “recognised, recognition and related expressions” insert—

““relevant transfer” (in sections 198A and 198B) section 198A(7)”;

(d) after the entry for “trade union” insert—

““transferee” and “transferor” (in sections 198A and 198B) section 198A(7)”

(a) Relevant amendments are the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995 (S.I. 1995/2587), regulation 7; and the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1999 (S.I. 1999/1925), regulation 7.

198B)

“transferring individual” (in sections 198A and 198B) section 198A(7)”.

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

4. The Transfer of Undertakings (Protection of Employment) Regulations 2006 are amended as set out in regulations 5 to 11.

Activities carried out by another person

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 (including the client) are to activities which are fundamentally the same as the activities carried out by the person who has ceased to carry them out.”.

(2) The amendment made by paragraph (1) applies in relation to a TUPE transfer which takes place on or after 31st January 2014.

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 sole or principal reason for the variation is the transfer.

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

(a) the sole or principal reason for the variation is an economic, technical, or organisational reason entailing changes in the workforce, provided that the employer and employee agree that variation; or

(b) 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 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 (and the reference to such a place has the same meaning as in section 139 of the 1996 Act^(a)).

(5B) Paragraph (4) does not apply in respect of a variation of the contract of employment 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 whether a contract of employment is effectively varied.”.

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

(a) the TUPE transfer takes place on or after 31st January 2014, and

(b) that purported variation is agreed on or after 31st January 2014, or, in a case where the variation is not agreed, it starts to have effect on or after that date.

(a) Regulation 2(1) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (S.I. 2006/246) defines “the 1996 Act” to mean the Employment Rights Act 1996 (c.18). There are amendments to section 139 which are not relevant to this provision.

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, which is transferred by regulation 4(1), 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 after the date of the transfer; and
- (b) the transferee is not a participant in 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 meet 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 31st January 2014.

Dismissal of employee because of 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 10 of the 1996 Act^(a) (unfair dismissal) as unfairly dismissed if the sole or principal reason for the dismissal is the transfer.

(2) This paragraph applies where the sole or principal reason for the dismissal is an economic, technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after a relevant transfer.

(3) Where paragraph (2) applies—

- (a) paragraph (1) does not apply;
- (b) without prejudice to the application of section 98(4)^(b) of the 1996 Act (test of fair dismissal), for the purposes of sections 98(1) and 135 of that Act (reason for dismissal)—
 - (i) the dismissal is regarded as having been for redundancy where section 98(2)(c) of that Act applies; or
 - (ii) 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 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 (and the reference to such a place has the same meaning as in section 139 of the 1996 Act).”.

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

- (a) the TUPE transfer takes place on or after 31st January 2014, and

(a) Part 10 has been amended on a number of occasions. The main relevant amendment to Part 10 was made by the Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 2012 (S.I. 2012/989), article 3.

(b) Section 98(4) has been amended by the Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011 (S.I. 2011/1069), regulation 3(1) and (2)(b).

- (b) the date when any notice of termination is given by an employer or an employee in respect of any dismissal is 31st January 2014 or later, or, in a case where no notice is given, the date on which the termination takes effect is 31st January 2014 or later.

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 sole or principal reason for the variation is the transfer and not a reason referred to in regulation 4(5)(a); and”.

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

- (a) the TUPE transfer takes place on or after 31st January 2014, and
- (b) the permitted variation is agreed on or after 31st January 2014.

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 1st May 2014.

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) at the end 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 the conditions in sub-paragraphs (a) and (b) of regulation 13A(1) applied at the time referred to in regulation 13A(1).”.

(a) Regulation 11 has been amended by the Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2009 (S.I. 2009/592), regulation 2(1) and (2).

(b) Regulation 13 has been amended by the Agency Workers Regulations 2010 (S.I. 2010/93), regulation 25, Schedule 2, Part 2, paragraphs 28 and 29.

(5) The amendments made by this regulation apply in relation to a TUPE transfer which takes place on or after 31st July 2014.

Jenny Willott

Parliamentary Under Secretary of State for Employment Relations and Consumer Affairs
8th January 2014
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^(a) 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^(b) (“the 2001 Directive”) 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. The 2001 Directive is implemented in the United Kingdom by the Transfer of Undertakings (Protection of Employment) Regulations 2006 (“the 2006 Regulations”). These Regulations amend the 2006 Regulations in their application in Great Britain. To the extent that they relate to the 2001 Directive they are made under section 2(2) of the European Communities Act 1972. To the extent that they relate to the treatment of employees, and related matters, in relation to a service provision change (in circumstances other than those to which the Directive applies), they are made under section 38 of the Employment Relations Act 1999.

These Regulations extend to Great Britain and not Northern Ireland.

Regulation 3 inserts new sections into the 1992 Act. These sections make provision for a transferee to elect to consult, or start to consult, representatives of affected transferring individuals about the transferee’s proposed dismissals before the transfer takes place and set out how sections 188 to 198 of the 1992 Act apply in cases where the transferee has made such an election.

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

Regulation 6 amends the provisions in regulation 4 of the 2006 Regulations concerned with 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 sole or principal 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 whether 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.

Regulation 7 inserts regulation 4A into the 2006 Regulations, to deal with the effect of a relevant transfer on contracts of employment which incorporate provisions of collective agreements as may be agreed from time to time.

Regulation 8 amends regulation 7 of the 2006 Regulations on the protection against dismissal in situations involving a relevant transfer. If the sole or principal reason for the dismissal of an employee is the transfer, the dismissal is treated as unfair for the purposes of Part 10 of the

(a) OJ L 225, 12.8.1998, p. 16–21 and a corrigendum was published at OJ L 59, 27.2.2007, p. 84.

(b) OJ L 82, 22.3.2001, p. 16–20.

Employment Rights Act 1996 (unfair dismissal). This does not apply if the sole or principal reason for the dismissal is an economic, technical or organisational reason 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 liability 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 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.

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

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