

**TRANSPOSITION OF PARTS OF COUNCIL DIRECTIVE 2001/23/EC AND  
IMPLEMENTATION OF COUNCIL DIRECTIVE 1998/59/EC, BY THE  
COLLECTIVE REDUNDANCIES AND TRANSFER OF UNDERTAKINGS  
(PROTECTION OF EMPLOYMENT) (AMENDMENT) REGULATIONS 2014**

1. Chapter 2 of Part 4 of the Trade Union and Labour Relations (Consolidation) Act 1992 (“the 1992 Act”) implements in Great Britain Council Directive 1998/59/EC on the approximation of the laws of the Member States relating to collective redundancies. Chapter 2 of Part 4 sets out requirements concerning collective consultation on an employer that is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less.
2. The Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE”) implements in the United Kingdom the Acquired Rights Directive, now revised and consolidated Council Directive 2001/23/EC (“the 2001 Directive”). TUPE safeguards employees’ rights when the business in which they work changes hands between employers.
3. The Collective Redundancies and Transfer of Undertaking (Protection of Employment) (Amendment) Regulations 2014 (“the 2014 Regulations”) relate to the implementation of those Directives in Great Britain. They make amendments to Chapter 2 of Part 4 of the 1992 Act and to TUPE. The 2014 Regulations do not extend to Northern Ireland. This transposition note addresses the transposition of options in the 2001 Directive and how implementation of both Directives is changed by the 2014 Regulations.

**Changes to the implementation of 1998/59/EC by the 2014 Regulations for situations involving a transfer of employees**

4. Regulation 3 of the 2014 Regulations inserts sections 198A and 198B into the 1992 Act to provide for the modified application of sections 188 – 198 of that Act, so that in some circumstances, a transferee can consult, or start to consult, with transferring individuals about proposed dismissals before the transfer takes place.
5. These provisions only apply where certain conditions are met and if the transferee has elected to consult (or start to consult) representatives before the transfer. The transferee may only make such an election if the transferor agrees to it and it must be made by way of written notice to the transferor.
6. Where the section applies, and the transferee has made such an election (which it has not then cancelled), sections 188 to 198 apply with the modifications provided for, as if the transferee were already the transferring individuals’ employer.

**Transposition and changed implementation of 2001/23/EC by the 2014 Regulations**

Article of 2001 Directive	Implementing regulations
<p>3.1</p> <p>The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer shall, by reason of such transfer, be transferred to the transferee.</p> <p>Member States may provide that, after the date of transfer, the transferor and the transferee shall be jointly and severally liable in respect of obligations, which arose before the date of transfer from a contract of employment or an employment relationship existing on the date of the transfer.</p>	<p>Regulations 4(1), (2), (4), and (5) of TUPE implement this provision.</p> <p>Regulation 6(1) of the 2014 Regulations replaces paragraphs (4) and (5) of regulation 4, dealing with the circumstances in which purported variations of contracts are void. It replaces them with new paragraphs (4) – (5C).</p> <p>The new paragraph (4) provides that any purported variation of a contract of employment that is, or will be, transferred, is void if the sole or principal reason for the variation is the transfer.</p> <p>The new paragraph (5) provides that paragraph (4) does not prevent a variation of the contract of employment if</p> <p>(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</p> <p>(b) the terms of that contract permit the employer to make such a variation.</p> <p>The new paragraph (5C) provides that paragraph (5) does not affect any rule of law as to whether a contract of employment is effectively varied.</p> <p>The new paragraph (5A) defines the reference to “changes in the workforce” in paragraph (5) to include 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 Employment Rights Act 1996).</p>
<p>3.2</p> <p>Member States may adopt appropriate measures to ensure that the transferor notifies the transferee of all the rights and obligations which will be transferred</p>	<p>This is an option in the 2001 Directive which is exercised by regulations 11 and 12 of TUPE.</p> <p>Regulation 10 of the 2014 Regulations amends regulation 11(6) of TUPE to change the deadline (in the absence of special circumstances making it not reasonably practicable) for the transferor to notify the transferee of employee liability information from not</p>

<p>to the transferee under this Article, so far as those rights and obligations are or ought to have been known to the transferor at the time of the transfer. A failure by the transferor to notify the transferee of any such right or obligation shall not affect the transfer of that right or obligation and the rights of any employees against the transferee and/or transferor in respect of that right or obligation.</p>	<p>less than 14 days before the transfer to not less than 28 days before the transfer.</p>
<p>3.3</p> <p>Following the transfer, the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement.</p> <p>Member States may limit the period for observing such terms and conditions with the proviso that it shall not be less than one year.</p>	<p>Regulation 5 of TUPE implements the first subparagraph of article 3.3.</p> <p>Regulation 6 of the 2014 Regulations inserts paragraph (5B) into regulation 4 of TUPE to take advantage of the option in the second subparagraph of article 3.3.</p> <p>This provides that the new paragraph (4) (the provision which makes any purported variation of a contract of employment void if the sole or principal reason for the variation is the transfer) 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-</p> <p>(a) the variation of the contract takes effect on a date more than one year after the date of the transfer; and</p> <p>(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.</p> <p>Regulation 6 also inserts paragraph (5C) into regulation 4 of TUPE which provides that paragraphs (5) and (5B) do not affect any rule of law as to whether a contract of employment is effectively varied.</p>
<p>Art 3.1 and 3.3 (particularly 3.1) (see</p>	<p>Regulation 7 inserts regulation 4A into TUPE. Regulation 4A(1) provides that where a contract of</p>

<p>entries above for the text of those articles).<sup>1</sup></p>	<p>employment, (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-</p> <p>(a) the provision of the collective agreement is agreed after the date of the transfer; and</p> <p>(b) the transferee is not a participant in the collective bargaining for that provision.</p> <p>Regulation 4A(2) provides that in these circumstances, 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).</p>
<p>Art 4.1</p> <p>The transfer of an undertaking, business or part of the undertaking or business shall not in itself constitute grounds for dismissal by the transferor or the transferee. This provision shall not stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce.</p> <p>Member States may provide that the first subparagraph shall not apply to certain specific categories of employees</p>	<p>Regulation 7 of TUPE implements this provision.</p> <p>Regulation 8 of the 2014 Regulations amends regulation 7 of TUPE to replace paragraphs (1), (2) and (3). Paragraph (1) provides that where 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 Employment Rights Act 1996 as unfairly dismissed if the sole or principal reason for the dismissal is the transfer.</p> <p>Paragraph (2) 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.</p> <p>Paragraph (3) is a re-structured version of the original paragraph (3). It provides that where paragraph (2) applies-</p> <p>(a) paragraph (1) does not apply;</p>

<sup>1</sup> The meaning of these provisions in their application to collective agreements has been the subject of rulings from the Court of Justice of the EU: *Werhof* C-499/04 and *Alemo-Herron v Parkwood Leisure* C-426/11. In the latter, the Court ruled:

Article 3 [of the 2001 Directive] must be interpreted as precluding a Member State from providing, in the event of a transfer of an undertaking, that dynamic clauses referring to collective agreements negotiated and adopted after the date of transfer are enforceable against the transferee, where that transferee does not have the possibility of participating in the negotiation process of such collective agreements concluded after the date of the transfer.

<p>who are not covered by the laws or practice of the Member States in respect of protection against dismissal.</p>	<p>(b) 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-</p> <p>(i) the dismissal is regarded as having been for redundancy where section 98(2)(c) of that Act applies; or</p> <p>(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.</p> <p>Paragraph (3A) provides that 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 Employment Rights Act 1996).</p>
<p>5.2</p> <p>This provides options to Member States to provide additional assistance and flexibility to transferees of insolvent undertakings by providing that certain debts will not transfer and that certain changes to terms and conditions can be agreed with the workforce.</p>	<p>TUPE implements this option in regulations 8 and 9.</p> <p>Regulation 9 of the 2014 Regulations makes an amendment to the definition of “permitted variation” in regulation 9(7) of TUPE which is consequential upon the amendments to regulation 4(4) and (5) set out above.</p>
<p>Article 7 deals with information and consultation requirements</p> <p>7.5</p> <p>Member States may limit the obligations laid down in paragraphs 1, 2 and 3 to undertakings or businesses which, in terms of the number of employees, meet the conditions for the election or nomination of a collegiate body representing the employees.</p>	<p>The article 7 requirements are implemented by regulations 13 of TUPE.</p> <p>Regulation 11 of the 2014 Regulations makes use of the option in article 7.5. It inserts regulation 13A into TUPE to allow micro-businesses to comply with regulation 13 (on informing and consulting representatives) by performing any duty which relates to appropriate representatives as if each of the affected employees were an appropriate representative. This may done if, at the time when the employer is required to give information under regulation 13(2)-</p> <p>(a) the employer employs fewer than 10 employees;</p> <p>(b) there are no appropriate representatives within the meaning of regulation 13(3); and</p>

	<p>(c) the employer has not invited any of the affected employees to elect employee representatives.</p> <p>Regulation 11 of the 2014 Regulations also makes related amendments to regulation 13(1) and regulation 15 (on failure to inform and consult)<sup>2</sup> of TUPE.</p>
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<sup>2</sup> Regulation 15 implements article 9 (which relates to the provision of remedies) in relation to the rights concerning information and consultation (in article 7).