



Northern Ireland  
Assembly

Committee for Employment and Learning

# OFFICIAL REPORT (Hansard)

TUPE Consultation Responses: DEL Briefing

15 January 2014

# NORTHERN IRELAND ASSEMBLY

## Committee for Employment and Learning

### TUPE Consultation Responses: DEL Briefing

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**Members present for all or part of the proceedings:**

Mr Robin Swann (Chairperson)  
Mr Thomas Buchanan (Deputy Chairperson)  
Mr Sammy Douglas  
Mr David Hilditch  
Mr Fra McCann  
Ms Bronwyn McGahan  
Mr Pat Ramsey  
Mr Alastair Ross

**Witnesses:**

Mr Conor Brady	Department for Employment and Learning
Mr Andrew Dawson	Department for Employment and Learning
Mr Tom Evans	Department for Employment and Learning

**The Chairperson:** Good morning, gentlemen. I welcome Mr Tom Evans, the deputy director of strategy in the European employment relations division; Mr Conor Brady, head of the employment relations policy and legislation branch; and Mr Andrew Dawson from the employment relations policy and legislation branch. Over to you.

**Mr Tom Evans (Department for Employment and Learning):** Thanks for the opportunity to come to the Committee and provide a briefing on the Transfer of Undertakings (Protection of Employment) Regulations (TUPE) consultation. We were with you in November 2012 in advance of the consultation to brief the Committee on the areas that were to be explored. You have a detailed paper on the analysis of the consultation responses. I will give a short overview of the areas explored before Conor goes into a little more detail — not too much — on some of the key analysis. Then, the three of us, including Andrew, who did a lot of the detailed work on the TUPE review, will be available to answer any Committee queries.

The current TUPE regulations were introduced in 2006 on a UK-wide basis, with the exception of the service provision changes that apply here in Northern Ireland. In December 2011, the Department, in conjunction with the GB Department for Business, Innovation and Skills (BIS) issued a call for evidence on the TUPE regulations. The purpose was to assess the effectiveness of the regulations as currently enacted.

The intended effect of the regulations is to preserve the continuity of an employee's terms and conditions when an effective transfer has happened. There have been continuing concerns, primarily expressed by employer bodies, to which this is obviously significant, that the regulations are too

complex, that they gold-plate the transposition of the acquired rights directive and that clear guidance is needed on employers' duties and employees' rights under the regulations.

Following an assessment of the responses to the call for evidence, the Department again, along with BIS, issued a UK-wide consultation in 2013 seeking views on a range of issues. The main issues are as follows: whether there is a need to repeal the service provision or change the provision introduced in 2006; the need, perhaps, to repeal provisions on employer liability information; possible changes to post-transfer harmonisation; changes to the economic, technical and organisational (ETO) reasons that restrict changes to terms and conditions following transfer; provision of guidance on the position of agency workers in TUPE, given that we transposed the agency workers directive back in 2011; changes to the provisions on information and consultation concerning transfers; amendments to recognise that, where services are transferred outside the UK and the EU, the existing provisions are unrealistic; and guidance on a number of other issues concerning the inter-relationship between TUPE and collective redundancies.

The consultation went out on a UK-wide basis, but the Minister has decided that we should provide a Northern Ireland response. We have met a number of stakeholders on that. In fact, at the Labour Relations Agency's round-table forum, the subject was raised with me by the Northern Ireland Committee of the Irish Congress of Trade Unions, and we confirmed that we would provide a Northern Ireland response.

A range of issues that came out of the consultation is annexed to the paper. The Minister is considering those issues and wanted us to come today to discuss them with you and to share the analysis of the consultation. He is keen to take the views of the Committee. Following that, the Minister will take decisions, and he has given a commitment that he will then go back to the Executive on any changes that would need to be put in place. Any changes would require legislation, and, again, the Committee would have ample opportunity to scrutinise and have us back to explore the issues that would be set out in draft regulations.

**Mr Conor Brady (Department for Employment and Learning):** Good morning, everyone. I can, if the Committee would find it helpful, give a brief overview of each of the issues that the Department is thinking about and the Minister is looking at. You have a more detailed assessment in the paper. I will try to keep it simple because we fully appreciate that TUPE is a very complex area, so I have tried to phrase this in a way that, as much as anything, I can understand.

**The Chairperson:** I thought that you were referring to the members.

**Mr C Brady:** Not at all.

At present, there is no limit on the length of time that a transferee must honour the terms and conditions agreed as a part of a collective agreement prior to the transfer. We are therefore considering whether to amend the TUPE regulations to allow a renegotiation of terms derived from collective agreements one year after the transfer, but that is provided that the overall change is no less favourable to the employee. In addition, we are considering providing a cut-off point for the transfer of terms derived from collective agreements. That amendment would mean that only collective agreements agreed at the date of transfer, not subsequently, would bind the transferee.

Under TUPE, where the sole or principal reason for a dismissal is the transfer itself, or is connected with the transfer, the dismissal is treated as automatically unfair for the purposes of unfair dismissal law, unless there is what we call an economic, technical or organisational reason for changes in the workforce. Over the past few years, the courts' interpretation of the provision has not included changes in place of work. This means that if, because of the transfer, the transferee employer intends to carry on the business in a different location but with the same number of staff overall, any dismissals resulting from the change of location would be automatically unfair. We are considering an amendment that will prevent genuine place-of-work redundancies from being automatically unfair.

Under the regulations, an employee's terms and conditions cannot be varied, even if both parties agree to any such change, if the variations are connected with the transfer itself. We consider that the current restriction in the regulations that applies here is too broad and we are considering whether to amend it to bring it closer to the language of the acquired rights directive, which the regulations transpose, as well as the Court of Justice of the European Union case law.

The regulations also treat a dismissal as unfair if the sole or principal reason for that dismissal is the transfer itself or a reason connected with the transfer that is not an ETO reason entailing changes in the workforce. Again, as with changes to terms and conditions, we consider that the provision is too broad and are considering whether to bring it closer to the language of the acquired rights directive as well as case law from the Court of Justice of the European Union.

We also want to try to provide further clarification on service provision changes. Case law has established that part of the test of whether TUPE service provision change occurs is whether the activities carried out after the transfer are fundamentally, or essentially, the same as those carried out before the transfer. We are considering whether to make an amendment that reflects this approach, which has been set out in case law.

With regard to the requirement to consult employee representatives in a TUPE transfer, it has been argued that this does not work very well in smaller or non-unionised workplaces where they do not have formally elected employee representatives. We are considering amending the regulations to allow microbusinesses to inform and consult directly with employees when there are no recognised independent union or existing employee representatives.

On employee liability information, the regulations currently require a transferor to provide certain employee information to a transferee 14 days before a relevant transfer. We are considering whether to extend that to 28 days in order to provide the transferee company with the information further in advance so that they can make the necessary changes or implementations for those employees. In addition to that, we are looking at the interaction between TUPE and collective redundancies legislation. Although the TUPE transfer cannot itself constitute grounds for dismissal, redundancies connected to the transfer can occur where there are the previously mentioned ETO reasons.

Where the potential for redundancies is likely to exceed 20 at one establishment, the duty to consult employee representatives about the redundancies is likely to apply. What that means is that there are two separate duties on the employer to consult. We are considering an amendment that would make it clear that consultation by the transferee, which begins pre-transfer, can also count for the purposes of complying with collective redundancy rules as a way of streamlining consultancy requirements.

What we are also doing — this is coming directly from feedback from consultees — is considering work to improve TUPE guidance so that businesses genuinely understand how to conduct a transfer fairly and in the most effective way.

The Department is considering taking no action in certain areas. In particular, we are considering retaining the service provision change rules, because feedback from consultees, or the majority of consultees, provides clarity in respect of when a TUPE transfer actually occurs. We are also considering keeping the position whereby a transferor cannot rely on a transferee's ETO reason to dismiss an employee prior to their transfer.

Finally, we are considering retaining the wording of one of the provisions so that where a transfer leads to a substantial change in working conditions, to the material detriment of an employee, the contract of employment may be treated as having been terminated.

That sets out the Department's thinking as a result of assessing the responses from consultees, particularly Northern Ireland consultees. As Tom mentioned at the outset, we are happy to take your views on any of this. We fully appreciate that this is a complex area of law, but if you have any questions we will be happy to answer them.

**The Chairperson:** With regard to extending terms and conditions for one year and guaranteeing them, most TUPE contracts are really in the service areas such as catering, security and cleaning provisions. Will guaranteeing the terms and conditions for one year affect the number of contracts that can potentially be transferred under TUPE? Manpower, services and the wage bill are the main costs in any overhead there.

**Mr Andrew Dawson (Department for Employment and Learning):** We do not think that it would affect that. In fact, the purpose of all the changes together is to encourage easier streamlining of TUPE transfers, so taking the package as a whole, including limiting collective agreements for one year, the effect, hopefully, will be to streamline the process.

**Mr C Brady:** The overall underlying principle of what we are considering on the back of this consultation is taking a pragmatic approach on the back of the directive. If we look at the directive, its driving principle is to protect employment rights in a transferee position. We are trying to work out how we can ensure a fair balance in retaining all those employment protections but also ensuring that their retention does not act as a barrier to businesses that wish to take over in a TUPE transfer situation. It is about finding that delicate balance between ensuring better regulation in that it does not provide a barrier but ensures that employee rights are maintained.

**The Chairperson:** You are saying that the terms and conditions should be no less favourable after that one year. Who will judge that?

**Mr C Brady:** That could be only the tribunals. When it comes to employment law, the tribunal system is the ultimate arbiter of what is fair and reasonable, and overall no less detrimental. Only they can be the arbiters in that case.

**Mr Evans:** When the transfer is happening, those issues would have to be explored when understanding the terms and conditions. Going back to your earlier point about the numbers, when people are taking on a new service, there may be a change in the number of people delivering that service for environmental, economic, technical or organisational reasons. That is provided for in the regulations. The issue that we are bringing forward is that a change in location may now come into the equation.

**The Chairperson:** I am just trying to get my head around this. When a new company takes on a TUPE contract, it will tell the employees, up front, that a year down the line their terms and conditions will be changing to a, b or c to enable them to enter into labour relations at that stage; but it would be only after a year into the contract.

**Mr Dawson:** There would be no duty to tell them up front. It would just allow them to renegotiate a collective agreement after one year.

**The Chairperson:** OK, so a year into the new contract, they can start to change the terms and conditions.

**Mr Evans:** There is a no-detriment basis as well. In a transfer, a whole due diligence process happens. Before a company takes on, it would want to understand the terms and conditions exactly.

**The Chairperson:** I am trying to clarify this more from the employee point of view, Tom. Are you going to amend the ETO reasons to include location or will you do away with some of them as well?

**Mr C Brady:** No. The proposal is — and I say proposal at this stage but it is what is in the Department's thinking, and again I have to emphasise that the Minister has not given any agreement to this — to add to the ETO reasons to ensure that where there is a change in location of a workforce, but the overall workforce numbers remain the same, that is added to the list of ETO reasons.

**The Chairperson:** Is that a change in location for the contract or the individual?

**Mr C Brady:** That would be for the overall —

**Mr Dawson:** The location of the workforce.

**The Chairperson:** The Royal College of Nursing states:

*"The repeal of regulation 4(9)&(10) and amendment to the definition of ETO could have a disproportionate impact on employees with protected characteristics such as disability (and childcare commitments amounting to indirect sex discrimination)."*

How do you see that playing out in the regulations?

**Mr Dawson:** Regulation 4 has been drafted so that it goes beyond the scope of the directive. The directive is compliant with sex discrimination legislation across the EU. In the Department's view, if we just repeal that element of gold-plating, as it were, it would still be compliant with equality legislation.

**The Chairperson:** It would be. Are those the sections that are being perceived by employers as being a form of gold-plating.

**Mr Dawson:** Yes; that has been the view of some employers. Anything that has gone beyond the directive — and regulation 4 was identified as key example — is gold-plating in the eyes of some employers.

**Mr Douglas:** Thank you for the presentation. I am not sure whether I should put my question to Conor or Andrew. I want to ask about the ETO reasons. Obviously, when you make rules, regulations and directives there are always exceptions, so I am just asking about some sort of flexibility. Let me give you an example. Not so long ago, someone came to me who was going through TUPE. He was a member of the security forces and was asked to go into an area where his life had been threatened. It was very difficult for him to make that change. He told me that he was afraid to go there but that he also wanted redundancy. How would you answer that?

**Mr Dawson:** It would come down to a matter of advice for the individual. If it got as far as a tribunal action, the matter would have to be decided by a tribunal. There is nothing in the legislation to deal with that individual case. I feel that it might have to go to a tribunal for determination.

**Mr C Brady:** When we write legislation, we try to cover, in broad brush terms, as many different situations as we can. Obviously, there are exhaustive lists of what can be addressed specifically in the legislation, and there will always be individual cases that are not directly addressed in the legislation. As Andrew mentioned, it is for the tribunal system to assess where they fit in that matrix.

**Mr Evans:** That particular difficulty is around a change in location. We want to include a change of location in the economic reasons.

**Mr Douglas:** Tom, I suppose that, particularly in the past year, people moving from one location to another has been quite difficult. There could be a fear factor from both sides of the community.

**Mr Evans:** Yes, absolutely.

**Mr Douglas:** That could be a big factor.

**Mr Evans:** It is an issue in all sectors, even in the public sector, when there is restructuring and movement. These are always difficult issues that need to be worked through.

**Mr Douglas:** I understand. Thank you.

**Mr P Ramsey:** I want to make some general points. The amendments were tabled to the consultees, who made submissions. Has the Department reflected the concerns raised in the submissions and amended some of the proposed changes?

**Mr Dawson:** One of the key areas that we looked at was repealing the service provision change elements of TUPE, so that, for example, when a cleaning contract in a building changes hands the employees would be protected under TUPE. The service provision change elements could also be described as a gold-plating of TUPE because they are not covered anywhere in the acquired rights directive. In the UK, service provision changes are covered under TUPE protections.

Initially, employers said that the service provision change elements should be repealed as they were an added burden on business. When the consultation proposals went out, trade unions and employee representatives were very concerned to keep them. Some employers then reconsidered and said that they should be kept as they provide added certainty for employers, even though they are a gold-plating of the directive. So, although repealing certain service provision change elements was initially a potential runner, we have looked at it and some employers and all employee representatives are convinced that the provisions should be retained. Therefore, the protections will continue to apply to affected workers.

**Mr C Brady:** I just want to add to that quickly. We refer to "gold-plating", and that term is always seen as being negative, particularly by employer representatives. However, there are arguments that, in certain situations for employees and employers, gold-plating can be a good thing and that there is

necessary gold-plating. We do not labour under the assumption that all gold-plating is bad. Employees and a significant number of employers have said that the service provision change element is one area that was gold-plating but that these are examples of justifiable and worthwhile gold-plating.

**Mr P Ramsey:** To be honest, I have not read the whole document. However, it appears to me that there is concern from employee representative groups that there could be a removal of certain elements of gold-plating. They have fundamental differences with some of the proposed amendments. Is that fair and reasonable?

**Mr Dawson:** Yes.

**Mr P Ramsey:** Whatever the Department's view, once it comes to a further stage, I think that we will need to seek guidance from the Law Centre and some of the employer bodies. We would not do this justice if we just give a nod and a wink to the Department today. I am concerned about a number of areas that the Law Centre and the Royal College of Nursing have raised. The jury is out as far as I am concerned, and I would like to think that the Department would reflect further on some of the fundamental submissions.

**Mr C Brady:** Absolutely. At this stage, we are simply reflecting the submissions received during the consultation. Ultimately, as I am sure that you will appreciate, it will be up to the Minister to decide the direction of travel, but whatever ministerial decisions are taken and whatever emerging legislation comes out of this, we welcome the Committee's increased attention on every piece of legislation. The guarantee is obviously there that every opportunity will be given to the Committee to comment further.

**Mr Dawson:** I do not want to single out any consultee in particular, but we were very impressed by the Law Centre's response. Not only did it look at the issues in the round, it brought in analysis of case law and evidence of its case working. We found that very useful in developing the consultation response.

**Mr Evans:** We are due to have further discussions and will meet the Northern Ireland Committee, Irish Congress of Trade Unions . Employment law is a surprisingly divisive area. We go to one forum and are told that there is not enough protection and we go to another, such as an employer body, and are told the opposite. The Minister has a really difficult process to go through.

Conor raised the issue of the service provision change elements and the importance of retaining them. He also said that some employers felt that, for the purposes of clarity and because they are comfortable with and understand them, it would be unhelpful to change them. However, that is a significant protection and a significant —

**Mr P Ramsey:** So, in essence, the amendments could be redrafted. Would that be fair? They could be changed somewhat. If you are having further meetings —

**Mr Evans:** We can feed that back to the Minister. We would have to go to the Minister with that. The Minister will obviously have to make the decision and take it to the Executive. As a result of the regulations' cross-cutting nature, the consultation and agreement to go out to consultation had to go to the Executive. He will have to go back to the Executive.

**Mr P Ramsey:** OK.

**The Chairperson:** OK. Thank you very much, gentlemen. Thanks for your time.