

THE TRANSFER OF UNDERTAKINGS (PROTECTION OF EMPLOYMENT) REGULATIONS 2006

REDUNDANCY AND INSOLVENCY PAYMENTS

Purpose of Guidance

1. The purpose of this guidance is to set out the Secretary of State's view of the application and effects of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("the 2006 TUPE Regulations") in the context of payments made by the Secretary of State to employees under the provisions of:

- Part XI of the Employment Rights Act 1996 (redundancy payments) and
- Part XII of the 1996 Act (payments on insolvency of employer).

2. This guidance is not an authoritative interpretation of the provisions of the 2006 TUPE Regulations. Only the tribunals and courts can give this. It however sets out the approach that the Secretary of State will apply in determining whether he is liable to make payments under the Employment Rights Act 1996 in the context of the 2006 TUPE Regulations. The 2006 TUPE Regulations apply to business and similar transfers on or after 6th April 2006 and replace the earlier 1981 Regulations. This guidance replaces earlier guidance in relation to the 2006 TUPE Regulations and insolvency.

2006 TUPE Regulations – Overview in the context of payments under the Employment Rights Act 1996

3. The 2006 Regulations apply to transfers of the whole or part of a business or undertaking or a change in a service provider (referred to in this note as "a relevant transfer") subject to certain exceptions. Regulation 4 provides that a relevant transfer does not operate to terminate the contract of employment of employees who were working in the business at the time of the transfer but transfers their contracts to the transferee. Those who would have been so employed by the transferor had they had not been dismissed in a manner described by Regulation 7(1) (see below) also have their contract of employment transferred to the transferee. This means that the transferor's powers, rights and liabilities under or in connection with the contract of employment are transferred to the new employer (subject to certain exceptions – see further below). Where an employee's contract of employment is transferred pursuant to regulation 4 and his employment continues with the transferee, no redundancy payment will be payable as the employee has not been dismissed.

4. Regulation 7 provides that a dismissal because of the transfer or a reason connected with the transfer that is not an economic, technical or organisational one is automatically an unfair dismissal. Regulation 8 makes a number of alterations in relation to insolvency. In summary these are as follows:

- Regulations 4 and 7 do not apply where the transferor is subject to "bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor".
- Where there is a relevant transfer and the transferor is subject to "relevant insolvency proceedings" (defined as insolvency proceedings which have been opened in relation to the transferor not with a view to the liquidation of the

assets) regulations 4 and 7 do apply. However regulation 8 provides for sums of the kinds described in Part XII of the Employment Rights Act 1996 which are owed at the date of the transfer to employees who transfer to the transferee to be payable by the Secretary of State rather than the transferee.

In addition regulation 9 provides a procedure whereby appropriate representatives of employees who transfer under the Regulations and the transferor or transferee may agree variation of contracts of employment where the transferor is subject to relevant insolvency proceedings.

Application of the 2006 TUPE Regulations to specific types of insolvency proceedings

5. The position regarding specific types of insolvency proceedings is as follows:

Bankruptcy

Where a trustee in bankruptcy sells a business that was run by the bankrupt there is no question of the employees' contracts of employment passing to the purchaser. In such a case there will be a redundancy of the employees and redundancy and insolvency payments owed to employees will be payable by the Secretary of State in accordance with the provisions of Parts XI and XII of the Employment Rights Act 1996. The reason for this is that regulation 8(7) provides that neither regulation 4 nor regulation 7 is to apply to bankruptcy proceedings.

Compulsory liquidation

Where a company is wound up by an order of the court on grounds that it is unable to pay its debts, regulations 4 and 7 of the 2006 TUPE Regulations do not apply as such proceedings are liquidation proceedings under the supervision of an insolvency practitioner that are analogous to bankruptcy proceedings. The position under case law was that on the making of a winding-up order this operates to terminate the contracts of employment of any employees as at the date of the making of the order. Employees will be entitled to insolvency and redundancy payments out of the National Insurance Fund in accordance with the provisions of the Employment Rights Act 1996.

Creditors' voluntary liquidation

Where a liquidator sells a business run by a company that is in creditors' voluntary liquidation regulation 4 and regulation 7 will not apply. These provisions are disapplied by regulation 8(7) by virtue of the fact that creditors' voluntary liquidations are liquidation proceedings under the supervision of an insolvency practitioner that are analogous to bankruptcy proceedings. Accordingly a transfer of a business by the liquidator in a creditors' voluntary liquidation would cause the dismissal of those employees who immediately prior to the transfer were employed by the company unless prior to the transfer there is an agreement between the parties (including the employees) that the transferee is to be substituted as their employer. In the absence of any agreement substituting the transferee as their employer, employees whose contracts of employment with the transferee are terminated will be entitled to be paid redundancy payments and arrears of wages etc. from the National Insurance Fund in accordance with the provisions of the 1996 Act.

Members' voluntary liquidation

Members' voluntary liquidation is not an insolvency proceeding. It is by definition a solvent winding up. Therefore regulations 4 and 7 apply if there is a relevant transfer and regulation 8 is not applicable at all.

Administration

The Secretary of State takes the view that regulations 4 and 7 will always apply in relation to a relevant transfer that is made in the context of an administration. He takes the view that such proceedings do not fall within regulation 8(7). For this exception to apply the proceedings must be analogous to bankruptcy proceedings and involve the liquidation of the assets under the supervision of an insolvency practitioner. Administration is not in the view of the Secretary of State analogous to bankruptcy proceedings. The correct approach is to look at the main or sole purpose of the procedure rather than its outcome in a specific instance. The main purpose of bankruptcy proceedings is to realise the free assets of an insolvent debtor and share the proceeds after deduction of costs and expenses amongst all the debtor's creditors. This is not the main purpose of administration. It follows that Regulation 8(7) will not apply to administration. It is also the view of the Secretary of State that regulations 8(2) to (6) will apply to administration so that liabilities owed to transferring employees at the transfer date of the kinds described in Part XII of the Employment Rights Act 1996 would fall to be paid out of the National Insurance Fund by the Secretary of State and not by the transferee.

Voluntary Arrangements

A transfer in the context of a voluntary arrangement is subject to regulations 4 and 7 for the same reasons referred to in relation to administration. In a voluntary arrangement the debtor is left in control of the assets and the function of the insolvency practitioner is merely to supervise the arrangement. Regulations 8(2) to (6) will apply in relation to a relevant transfer where the transferor is subject to a voluntary arrangement. Liabilities owed to transferring employees at the transfer date of the kinds described in Part XII of the Employment Rights Act 1996 do not transfer to the transferee and would fall to be paid by the Secretary of State out of the National Insurance Fund.

Administrative Receivership

Regulations 4 and 7 will apply to administrative receiverships. They are not analogous to bankruptcy proceedings since they are not collective proceedings and the exception in regulation 8(7) will accordingly not apply. Where there is a relevant transfer regulations 8(2) to (6) will apply so that liabilities owed at the transfer date to transferring employees of the kinds described in Part XII of the Employment Rights Act 1996 do not transfer to the transferee and would fall to be paid by the Secretary of State out of the National Insurance Fund.

Other types of receivership

Other types of receivership are not insolvency proceedings and so the provisions of regulation 8 do not apply to them. A relevant transfer by a receiver will therefore be subject to regulations 4 and 7.

Proceedings in other jurisdictions where a relevant transfer occurs in Great Britain

In this case it is necessary to consider whether the foreign proceedings are analogous to bankruptcy proceedings. If they are then the exception in regulation 8(7) will apply.

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