Law Centre (NI)

About the Law Centre

The Law Centre is a public interest non-governmental legal organisation that aims to advance social welfare rights. We work to promote social justice and we provide specialist legal services to advice organisations and disadvantaged individuals through our advice line and our casework services from our two regional offices in Northern Ireland. The Law Centre provides a specialist legal service (advice, representation, training, information and policy comment) in five areas of law: social security, mental health, immigration, community care and employment. Law Centre services are provided to over 400 member agencies in Northern Ireland. Through our employment advice service we have a daily exposure to the range and type of contentious employment law problems that arise. We provide advice and legal representation before the Industrial Tribunal and Fair Employment Tribunal for employees/workers who do not have alternative access to legal advice/representation.

Confidentiality & Data Protection

The Law Centre is happy for our response to be published or released.

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Please tick the boxes below that best describe you as a respondent to this:

☒ Charity or social enterprise

☒ Legal representative

Law Centre (NI)

Question 1: Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes?

No, we disagree with this proposal.

We maintain that the Service Provision Regulations ("SPC Regulations") provide clear benefits in terms of increased transparency and reduced burden on business. We believe that employers and employees know where they stand under these Regulations, which enable employers to plan accordingly.

The 2006 amendments brought more service provision changes within the ambit of TUPE. As outlined in the consultation document, the intention was to apply TUPE to most service provision changes, thereby:

- Giving greater legal certainty;
- Ending any exposure to fluctuating case law;
- Creating a more level playing field in the tendering process; and
- Reducing costs.

It is our view that the 2006 amendments have been relatively successful and we are deeply concerned that we will return to a state of uncertainty if these amendments are repealed. Indeed, although we have concerns about the TUPE framework, they primarily relate to the widespread deficiencies in relation to employer *compliance*, rather than deficiencies with the amendments themselves.

Last year, the Law Centre responded to the BIS/DEL call for evidence on the effectiveness of the Transfer of Undertakings (Protection of Employment) Regulations 2006.[1] We made the point that a large number of "service provision changes" also meet the definition for transfer of an undertaking – the categories are not mutually exclusive. Effectively, therefore, even if the 2006 regulations are repealed, TUPE may still apply in some situations. We therefore foresee an inevitable increase in costly litigation on this point. Of the TUPE advice queries the Law Centre receives, a significant number relate to the transfer of cleaning and security contracts. We believe that TUPE could continue to apply in such labour-intensive services where the new employer takes over a major part of the workforce. We surmise that repealing the 2006 Regulations will create much uncertainty as, on paper, it would appear that TUPE is no longer relevant in a particular situation, whereas our assessment is that it may well still be legally applicable.

The government acknowledges that there was some uncertainty stemming from domestic case law in this area but argues that the position is now more settled since the judgement on service provision changes in Süzen in 1997. [2] We would strongly disagree with this assessment and indeed we take the view that current caselaw does *not* offer certainty.[3] As a result, we think this will inevitably lead to unnecessary litigation including in relation to the transfer of labour-intensive businesses.

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[1] Our response is accessible here: http://www.lawcentreni.org/Publications/Policy-Responses/LCNI_evidence_to_DEL%20_BIS%20Feb_2012.pdf

[2] Ayse Süzen v Zehnacker Gebäudereinigung C-13/95

[3] CJEU (*CLECE SA v (1) Valor (2) Ayuntamiento de Cobisa* [2011] IRLR 251), *ECM (Vehicle Delivery Service) Ltd v Cox* [1999] IRLR 559 *ADI (UK) v Willer* [2001] IRLR 542 and *RCO Support Services v Unison* [2002] IRLR 40

b) Are there any aspects of the pre -2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

See above

Question 2: If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any change takes effect?

No comment.

a) Do you believe that removing the provisions may cause potential problems?

Yes. As above, we foresee an increase in litigation.

Question 3: Do you agree that the employee liability information ("ELI") requirements should be repealed?

No, we disagree with this proposal.

Regulation 11 (6) requires the transferor to provide relevant information to the transferee at least 14 days before the transfer takes place. The purpose of this regulation is to facilitate the early provision of information about the transfer. This is in the interests of transferees and employees. Provision of ELI ensures that transferees are fully informed about the terms and conditions of prospective transferring employees (thus allowing the transferee to plan the transfer and to be fully informed of the true cost of the transfer) – this requirement is all the more important in the context of a second generation SPC where there is no direct link between the transferor and transferee. The provision of ELI is of benefit to transferring employees as it reduces the risk of post-transfer disputes arising around the employees' terms and conditions.

Unfortunately, it is our experience that some employers pay no heed to this regulation. Where information about a proposed transfer is provided, it is often inadequate or provided at the last minute - including on the eve of transfer. We believe this reflects a disregard for the provisions of TUPE in respect of the protection of transferring employees' terms and conditions.

Case study

We acted recently for employees who experienced difficulties with attempts to change their terms and conditions following a TUPE transfer. The transferring employer had complied with their obligations to provide ELI, and as a result the contractual position of the employees was clearly set out, easily identifiable and enabled the transferring employees to stand over their contracts and resist any potential breach (this being the underlying *raison d'être* of the TUPE legislation). The absence of ELI would have increased uncertainty and areas of dispute, making a complicated situation even more difficult and costly to resolve for all parties concerned. Provision of information is not, in our view, an onerous obligation and has clear benefits for different parties.

It is clear from the consultation document that the government is aware that the ELI requirement is not working properly.[4] The government seeks to introduce a de-regulatory alternative to the ELI requirement, believing that there is a case for leaving the exchange of information to be resolved by the parties to transfers, combined with guidance and model terms for contracts.[5] We are baffled by this proposal. If the ELI requirement is not working properly it is because of poor compliance: the regulation *per se* is not faulty. The problem of lack of compliance with the current requirements of ELI will not be resolved by repealing the provisions of Regulation 11(6). Indeed, repeal of the provision will only serve to confirm to employers that protection of transferring employees' terms and conditions in TUPE transfers is not considered a priority by Government.

In short, we do not think the ELI should be repealed. We view it as an essential and irreducible, obligation. We would also urge DEL to consider how it can encourage compliance with respect to this regulation.

b) Would your answer be different if the service provision changes were not repealed?

The case for strict observance of the provisions for ELI is even more pressing in SPC situations involving second generation contracts where there is no direct link between "OldCo" and "NewCo".

c) **Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?**

Yes but we do not consider this to be an area of significant concern. .

As above, we believe that non compliance with existing requirements is widespread and therefore we urge DEL to consider how best to ensure that regulations are adhered to and respected.

Question 4: Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

No. The prohibition on post-transfer variations of employees' terms and conditions of employment is absolutely fundamental to TUPE. If this protection is eroded then it removes one of the key pillars of the Directive. We therefore doubt that provision for variation could be made without breaching the Directive. As highlighted in our 2012 response, we would also foresee an increase in litigation, including challenges to the CJEU, on this particular point. It is likely that employers seeking to take advantage of any perceived derogation would expose themselves to costly legal challenges.

[4] Paragraph 7.25
[5] Paragraph 7.29

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Our concern about introducing new 'harmonised terms' is that unscrupulous employers might pressurise employees into accepting them. If some limited harmonisation of terms and conditions is to be permitted, employees must be given protection against dismissal (or other detriment) should they refuse to accept new terms.

b) Do you agree that the exception for economic, technical or organisational reasons entailing changes in the workforce should be retained?

Yes, we recognise that in a genuine ETO situation, variations of terms and conditions may be required but such variations should be strictly within the confines of a genuine ETO that involves changes in the workforce.

Question 5: The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

No. Consideration of this provision should be deferred pending the CJEU's decision in Parkwood Leisure v Alemo-Herron.

- **b) Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?**

We would be extremely doubtful about the feasibility of implementing a rule that permits variations provided that the 'overall change is no less favourable to the employee'. In this respect, our arguments remain unchanged since our 2012 response:

In practice, there is only one way that it could be determined whether an overall package was "no less favourable" – by the decision of an employment/industrial tribunal. Every case would have to turn on its own facts, as the allegedly balancing contractual changes would differ in every case. It is all too easy envisage widespread disagreement between employer and employee as to whether one change balanced another. This is a recipe for tribunal claims on a large scale.

- **c) If the outcome of the *Parkwood Leisure v Alemo-Herron* litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions?**

No comment.

- **d) Do you think there any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3(3) of the Directive)?**

No comment.

Question 6: Do you agree with the Government's proposal to amend the wording of regulation 7(1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and the CJEU case law on the subject?

No, we disagree with the Government's proposal. We believe that the current provisions in Regulation 7(1) and (2) are well understood and do reflect EJEU case law on the subject.[6]

b) Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

We believe that the current provisions are well understood and there is no need for amendment.

Question 7: Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

No. We believe that the proposed changes will restrict the rights of employees who are subject to transfers/service provision change and give greater scope for employers to impose unlawful variations to working conditions. We note the proposed variation may also have the effect of preventing employees from resigning prior to the transfer as Art 4(2) of the Directive refers to "the transfer *involves*..." whereas Reg 4(9) states "*involves or would involve*..."

Question 8: Do you agree with the Government's proposal that "entailing changes in the workforce" should extend to changes in the location of the workforce, so that "economic, technical or organisational reason entailing changes in the workforce" covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

No, we disagree with this proposal.

The Government points to an 'anomaly' whereby the meaning of 'entailing changes in the workplace' does not reflect the definition of redundancy in the 1996 Order. In our view, the Government is missing the point here. TUPE was specifically designed to provide *additional* protections for employees affected by a transfer. If the proposed definition is adopted it will simply permit gross abuse by transferees i.e. closure of a transferor's workplace thus enabling transferee to take the benefit of the transfer without having to take the employees. If there is a genuine need for a transferee to close a place of business then this would fall within the existing ETO provisions which permit dismissal/contract variation.

Question 9: Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

[6] In *P Bork International A/S (in liquidation) v Foreningen af Arbejdsledere i Danmark and Ors* [1989] IRLR 41 ECJ, the court referred to a dismissal "by reason of" a relevant transfer.

No, we disagree with this proposal as to allow it would remove a vital protection of TUPE.

The idea that a transferor can dismiss for a transferee's ETO reason runs contrary to the whole spirit of TUPE. If this amendment is permitted, we will see a substantial increase in the dismissal of employees prior to transfer for alleged transferee ETO reasons simply because it will be an easy way for the transferee to avoid TUPE obligations. The inconvenience that some employers experience as a result of the current regime (as per paras 7.73 and 7.74) is a small price to pay for the important protection that TUPE affords employees affected by a transfer (and specifically transferor's employees).

Question 10: Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

No, we disagree with this proposal.

Again, such an amendment would be an erosion of the protection of TUPE. In any event, a transferor is not in a position to consult meaningfully in respect of a transferee's business. We believe that this proposed amendment is motivated entirely by some employers' desire to shorten the mandatory consultation periods at the cost of employees' right to meaningful consultation.

Question 11: Rather than amending 13(11) to give clarity on what a "reasonable time" is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

Yes. We believe that guidance would be preferable to a defined timescale for the reasons set out in para 7.92.

Question 12: Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

No, we disagree with this proposal. We believe that the current proposals for employee representative election are not onerous and that to remove such requirement may send out a message that Government does not value the information and consultation obligations under the Regulations. This is particularly worrying given that it is our experience that the obligation to inform and consult is frequently ignored altogether (see our further comments at Q. 15, below).

In addition, in our experience of speaking to employees who are facing a potential transfer, individuals often feel very vulnerable in the period preceding a transfer. They may come under considerable pressure from the transferee (either through the transferor or directly) to agree to unlawful variations of contract. The value to employees of being afforded the

right to a representative to act on everyone's behalf should not be underestimated. In particular, it reduces the risk of a transferee being able to "pick off" individual employees to pressurise them to agree to unlawful variations of contract.

We believe the Government should be seeking to enhance the protection for employees in respect of the duty to inform and consult rather than further chipping away at such protections.

a) If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

No.

Question 13: Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

No comment.

Question 14: Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

No comment

Question 15: Have you any further comments on the issues in this consultation?

We believe that the Government should use this consultation as an opportunity to review how it can improve adherence by employers to the information and consultation obligations under Regulation 13. In our experience, the information and consultation obligations are frequently completely ignored and where consultation does take place, it is often used as a means by employers to introduce unlawful variations of terms and conditions. As stated above, employees facing potential transfer often feel extremely vulnerable and may agree to unlawful variations as a result of pressure being exerted.

Case studies

We advised in a SPC case where the transferee was insisting on "consulting" with the transferor's employees directly well before the proposed date of transfer and put considerable pressure on the employees to agree to unlawful changes to terms and conditions. The transferor was unwilling to put the employees' concerns to the proposed transferee and the employees ended up having to deal directly with the transferee (supported by advice from Law Centre (NI)).

In another case involving a very large transferee who was taking over numerous employees across the UK, employees were not informed that the transfer until after it had happened. They were then advised that a wholesale reorganisation of the transferee's business was taking place and as a result it appeared that the majority of the transferred employees would face redundancy. The employees believed that the transferee had deliberately delayed announcing the proposed reorganisation until 3 months post-transfer in order to avoid any possible claims arising for breach of Reg 13.

Question 16: Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?

No comment

Question 17: Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

No comment

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