

STATES OF JERSEY



TRANSFER OF UNDERTAKINGS PROTECTION OF EMPLOYMENT (TUPE) LEGISLATION (P.60/2012): COMMENTS

**Presented to the States on 9th July 2012
by the Minister for Social Security**

STATES GREFFE

COMMENTS

The Proposition

Part (a) of the Proposition relates to the role of the Minister for Social Security in proposing employment legislation that applies to all employees and employers in Jersey. Part (b) of the Proposition relates to the relationship of the States Employment Board with its own employees.

The Minister supports treating employees in a fair way; however he considers that it is not appropriate to design employment legislation to address a particular employment situation that is developing in the public sector. That is a matter to be dealt with by the States Employment Board.

The draft legislation

Whilst a legislative framework has been prepared based upon the UK model of TUPE, expert advice suggests that the draft should be entirely reviewed to create a new model that is appropriate for Jersey rather than being driven by EC Directives.

A number of complex policy decisions would be required on the fundamental protections that the Law would give. The Law should be as clear as possible so that employers and employees understand their rights and responsibilities. It would be essential to carefully consider the scope of protection and what outcomes we expect from the Law, including: to determine what constitutes a relevant business transfer, and to what extent employees' terms and conditions will be protected.

Impact

The preparation and implementation of business transfers legislation would have a negative impact in a number of areas.

The legislative timetable – The legislation would bring a cost to the Department and to the Island. Deputy Southern was advised, prior to lodging his Proposition that, if business transfers legislation is to be prioritised, in accordance with his timetable, Departmental and Law Drafting resources would have to be diverted from discrimination and/or family-friendly legislation in 2012 and 2013. As is reflected in the Social Security Department's 2012 Business Plan, the Minister is committed to developing draft discrimination legislation by the end of 2012 and, of the other Phase 2 employment rights, has prioritised family-friendly rights. These protections will affect a greater number of Islanders than business transfers legislation.

Meeting international obligations – Jersey must ensure compliance with certain international principles that require measures to protect people against race and sex discrimination, as well as to give certain protections relating to maternity. These include the International Covenant on Civil and Political Rights (ICCPR), the UN Convention on the Elimination of Racial Discrimination (CERD), and the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). There is no such international pressure relating to business transfer situations.

Protecting employees – Not all aspects of business transfers legislation are to the benefit of employees. Previous consultation undertaken by the Employment Forum 6 years ago did not contemplate the potential drawbacks for employees:

- Where employees are automatically transferred to a new employer, they are not entitled to redundancy pay.
- An ability to contract out large sections of the workforce with no liability for redundancy pay provides a smooth mechanism for the employer and potentially encourages employers to contract out services to other providers.
- Employees may not always support the business being transferred to a new employer, but cannot stop it happening.
- The requirement to preserve employees' terms and conditions may act as a barrier for the new employer and put jobs at risk.
- It would not become more difficult for an employer to make redundancies; any redundancies made after the transfer become the responsibility of the new employer.

Burdens on business – Business transfers legislation brings a great deal of uncertainty for business in the UK. The legislation has developed over a number of years and the interpretation of the law continues to shift based on decades of case law, bringing new uncertainties about when the law is engaged. The UK position is not as clear as it appeared to be in 2006 when the Employment Forum conducted its consultation. If a new Law is to be introduced, it is essential that we are clear on the problem that we are trying to address and what the risks are, rather than following a TUPE model that has developed from case law and European directives.

The UK Government is currently reviewing its Transfer of Undertakings (Protection of Employment) Regulations, 2006, to assess how they might be improved to reduce bureaucracy and burdens on business, whilst continuing to provide appropriate levels of protection for employees. Consultation is expected to be undertaken in 2012 and it is important that the outcomes of this review be considered before any legislation is introduced in Jersey.

Conclusion

The second phase of employment legislation is being introduced in a measured timescale. In the period 2009 to 2011, the Department has introduced redundancy rights for employees, including the right to statutory redundancy pay and a duty for employers to consult employee representatives in collective redundancy situations, as well as making provision to compensate employees where their employer is insolvent.

The Department already has a full schedule of legislation to prepare in 2013 – 2014. A steady introduction of new legislation and its impact is essential. The Minister should be relied upon to set an appropriate timetable, taking into account other States strategic and Departmental priorities, as well as the economy and the impact on businesses.

The Minister opposes the proposition.

RESOURCE IMPLICATIONS:

Whilst the legislation is likely to bring little, if any, cost to the Jersey Employment Tribunal and the Jersey Advisory and Conciliation Service, the legislation would bring a cost to the Department and to the Island. Deputy Southern was advised, prior to lodging his Proposition that, if business transfers legislation is to be prioritised, in accordance with his timetable, Departmental and Law Drafting resources would have to be diverted from discrimination and/or family-friendly legislation in 2012 and 2013.