

# STATES OF JERSEY



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

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**Presented to the States on 9th July 2012  
by the States Employment Board**

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**STATES GREFFE**

## COMMENTS

### Rationale

Transfer of employees from one organisation to another within the European Union is determined by the Acquired Rights Directive (ARD). Its implementation has been tempered by pre-existing legislation protecting employee rights. In the UK such transfers are executed under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (known as TUPE). It should also be recognised that a significant body of case law has been built up both within the UK and European Jurisdiction which has interpreted the ADR and TUPE 2006 Regulations.

The substantive issue is whether the jurisdiction should have the equivalent of UK TUPE legislation or consider implementing something more measured and appropriate to Jersey's economic context.

The demanding timetable indicated by Deputy Southern in his proposition is not feasible without significant dislocation to the existing legislative timetable as shown by Social Security in their 2012 Business Plan. Commitments have already been given to developing Discrimination and other family-friendly laws. Assuming Social Security were able to change drafting priorities for new legislation with the approval of the States, enactment of a Jersey TUPE Law could take at least 18 months and potentially longer if further public consultation were to be undertaken which SEB believe will be necessary.

An accelerated agenda for the introduction of TUPE in Jersey as inferred by the 2013 deadline severely constrains the opportunity for a tailored Jersey approach to TUPE to be developed and which learns the lessons from the ARD (see attached Annex) and UK TUPE. In the current economic climate the introduction of TUPE style legislation may lead to reduced flexibility and constrained economic performance. It is preferable to properly consult and evaluate proposals which meet the spirit of TUPE rather than create a rigid legislative framework. Any framework or legislation should encourage business growth and development notwithstanding any appropriate protection for employees.

The concept of a transfer on the same terms and conditions of employment may be challenging in practice. 'Same' as in the context of the ARD does mean the same 'i.e. not substantially similar or comparable in the aggregate'. Accordingly, compliance with UK TUPE for example, or the detail of legislation implied in Deputy Southern's proposition, will be obliged to replicate each and every benefit provided by the transferring company before the transfer (pensions excluded by UK TUPE and ARD) can be effected. This may be extremely costly, difficult and undesirable in practice to achieve given differing employment practices in organisations.

Consideration of variations on TUPE could reduce the areas covered, but certainly include pay, hours, holidays, etc., and this would be viable for smaller and larger organisations alike. The framework can make it clear what organisations are in or out of scope, tailoring to the specifics of the local economy, for example excluding organisations with a certain number of employees or less, cover contractual changes that the new employer could make to contractual terms and conditions by way of economic, technical and organisational imperatives ('ETO' in UK TUPE and ARD), and modify consultation to enshrine existing collective consultation requirements already in place under Jersey employment law. Such an approach is consistent with

SEB's current approach to transfers and reflects the earlier approaches to Jersey Electricity and Jersey Telecom.

SEB is already considering as part of their work plan adoption of a similar approach based on the UK's Cabinet Office principles, which would apply to public sector employees, employers and their representatives and place a contractual obligation on private companies engaging with the public sector to adhere to this framework. The intention is that this guidance will form a framework which provides clarity, not only at point of transfer but post-transfer – an area that was not fully addressed when Post and Telecommunications were incorporated. The UK Cabinet Office guidance applies to transfer of undertakings from the public sector, which together with the BIS (Annex – Background) Employment Rights Guidance, this forms a strong baseline for Jersey to build on.

Discussions are already taking place with Ports and Housing to develop this framework approach. Significantly, this includes consultation with Trade Unions, not only as to how it will work for the current planned transfers, but also taking the concept forward in the future.

This approach pre-empts the need for legislation and provides a more flexible approach consistent with changes in economic trends – an issue to which the UK TUPE legislation has not been able to respond.

Importantly this extends the principles of alternative service provision already agreed by SEB to be developed into a formal framework of guidance in the initial stages for the Public Sector, and once this has been established as best practice it might be implemented for the private sector as a model statutory employment code following formal consultation.

A key aspect of any transfer of undertakings is the contractual arrangements that are put in place. These can and should require the safeguarding of employment rights, preservation of basic terms and conditions and consultation arrangements, in accordance with existing Jersey employment law (and thus avoid any duplication and confusion that separate TUPE legislation could bring), making sure that detailed arrangements as covered in the proposition are in place and agreed before a transfer can be finalised.

The SEB is already addressing issues relating to Pensions with regard to alternative services provision; this is excluded under UK TUPE and ARD. From previous experience with the incorporation of Jersey Telecom and Jersey Post, one of the key issues which impacts on the co-operation of employees with transfer, is that of pension rights. The SEB already makes the decision whether to allow admitted body status for employees affected by transfer to another undertaking on an open or closed scheme basis. A number of factors are taken into account, such as the cost and risk to PECRS. This does not need further legislation and so any proposals for pension transfer rights such as those suggested by Deputy Southern would not be required.

### **Financial and manpower implications**

One of the lessons learned from the UK and Europe is that because TUPE is predominantly determined by case law, the interpretation is subject to frequent shifts and more so in times of economic uncertainty. The level of employment tribunals in the UK is at an all-time high. Many of claims brought before the Tribunals relate to

unfair dismissal and selection for redundancy arising from outsourcing, as many organisations seek to make savings in non-core areas of their business.

The SEB believes that the introduction of TUPE legislation would have inevitable and significant consequences for the Jersey Employment Tribunal and JACS, as this will be a key way in which the interpretation and applicability of legislation can be tested. There will be knock-on cost implications if TUPE legislation is introduced. There is no doubt that it will create further opportunities for the legal community to engage in the contractual relationship between employer and employee with the attendant costs and workload.

The UK TUPE has proved extremely costly for both parties involved in transfers in legal fees and costs, project costs, consultancy fees, due diligence, and compensation to employees (redundancy payments and unfair dismissal claims). It is disingenuous to claim that the introduction of a TUPE in any form can be achieved without the recognition that it will impose a financial burden on organisations both private and public which does not currently exist.

### **States Employment Board position**

For the reasons given above, the States Employment Board opposes the proposition.

**BACKGROUND COMMENT**

As referred to in Deputy Southern's proposition, the European Acquired Rights Directive (ARD) protects the rights of employees on the transfer of a business or part of it or where a service or function is outsourced to a service provider. It was implemented in the UK by the Transfer of Undertakings (Protection of Employment) Regulations 1982. There have been a number of amendments to this legislation, culminating with the last one in 2006, which sought to provide clarity on whether or not the Regulations apply to particular contracting out or analogous situations.

The Department for Business Innovation and Skills (BIS) is currently seeking views on the effectiveness of the Transfer of Undertakings (Protection of Employment) Regulations 2006 and how they might be improved. Whilst the Regulations implement a European Directive and provide important protections for both employers and employees, the UK Government is concerned that some businesses believe they are 'gold-plated' and overly bureaucratic. A formal consultation on any proposed changes is being considered for later in 2012.

One of the purposes of the directive was to eliminate the vulnerability of and uncertainty for employees and, in times of commercial growth and activity to provide them with some protection. In time of economic uncertainty the current rigours of UK TUPE impose tough constraints on organisations in both the public and private sectors in their endeavours to achieve savings and efficiencies. This has resulted in calls from UK businesses to reduce the burden of TUPE and instead put in place a TUPE 'Lite' which is more flexible and adaptable in tough times, and in particular makes it less onerous for smaller businesses who are less able to afford the cost the demands place upon them.

Other jurisdictions such as Guernsey do have a form of TUPE (highlighted by Deputy Southern). Guernsey's legislation came about because of the incorporation of its telecommunications into a separate entity in 2001 (cf. Jersey Telecommunications Law 2002) and like the Jersey equivalent pre-dated the later refinements introduced in UK TUPE legislation in 2006. Use of such models now would not be fit for purpose in the current economic climate or consistent with developing UK and EC employment casework.