

STATES OF JERSEY

r

EMPLOYEE PROTECTION: LEGISLATION

Lodged au Greffe on 27th July 2006
by Senator B.E. Shenton

STATES GREFFE

PROPOSITION

THE STATES are asked to decide whether they are of opinion –

- (a) to request that the Minister for Social Security bring forward, as soon as resources allow, draft legislation, the purpose of which is to protect the continuity of employment and terms and conditions of employees who are in the employ of an undertaking that is to be transferred;
- (b) to defer the sale of all public utilities until the above employee protection is in place.

SENATOR B.E. SHENTON

REPORT

Before I start this report I would like to make the points –

1. I am not against the privatisation of Jersey Telecom. It is my personal opinion that certain sectors and tasks can be handled far better in the private sector, and certain sectors and tasks can be handled far better in the public sector. Jersey Telecom operating in a monopoly situation is a totally different proposition to Jersey Telecom operating in a competitive environment with the sledgehammer JCRA legislation in the background. In some respects the past performance and returns of Jersey Telecom are irrelevant as going forward it will have to be a totally different animal.
2. I believe that employment protection legislation has to be handled very carefully and if it becomes too tilted in favour of the employee jobs will be lost and it will have an adverse affect on economic growth. I have viewed some of the recent tribunal decisions with grave concern and I am concerned that the effective elimination of short-term contract employment could have long-term ramifications. The current legislation protects the mediocre. In a competitive world can an employer afford to carry staff?
3. I do not want to cost the taxpayer money by delaying the sale of Jersey Telecom and reducing the possible sale proceeds. For this reason I asked the Chief Minister on the 18th July 2006 whether talks were progressing with any potential buyers of the Company. I was given the assurance that no talks were taking place and a full consultation process will be followed prior to any sale. With this assurance I lodge this proposition.

Summary

The road towards the privatisation of Jersey Telecom has been long and tortuous. In order to privatise we first needed incorporation and this was followed by the setting-up of a competition regulator. We are now nearing the point where the telecom asset will be sold. It is sad that the proceeds will not be used for the benefit of Islanders, instead it will sit in the Strategic Reserve until the end of time. I won't digress into how our Treasury operates with the imagination of a Victorian seaside town council rather than making money work for the betterment of the community. It's a bit ironic that an International Finance Centre has such a appalling record when it comes to its own economic management.

The whole privatisation saga and timescale sums up the attitude of the type of Government that we have been saddled with during the past 10 years. Everything has been done to facilitate the sale, to make money, to add to the coffers – but no one gave a thought to the real people of Jersey – the workers that we the politicians are meant to represent. Where is the employee protection? Should we not have considered this when we started down the privatisation path?

As I said before, I am not a fan of sledgehammer regulation and I never thought that I would be bringing a proposition adding to the current employment regulation. However if you read the TUPE requirements they are not onerous, and this proposition seeks TUPE type legislation tailored to the Jersey marketplace. In fact the regulations are no more than an employee should expect faced with a takeover. Change is disconcerting and as a Government we have a duty to ensure that look after our workers.

The Social Security Department already has a consultation paper out entitled Redundancy and Business Transfers.

I apologise to the Minister for Social Security for I may have lumbered his department with more unexpected work (on top of the winter fuel allowance). However, he should perhaps blame the lack of consultation on party mentality of the Ministerial System. It is important that this proposition is lodged and debated before any proposition lodged by the Council of Ministers in respect of the Jersey Telecom privatisation. Therefore timescale and confidentiality was paramount. Furthermore, I understand that resources within his department are stretched at present and, as a concession to this, I have worded the proposition that implementation should take place “as soon as resources allow”. Furthermore, as previously stated, the regulations should be tailored to be appropriate for the Jersey marketplace/economy (bespoke).

Finally, it is intended that each part of this proposition will be voted on separately. Whilst the proposition is in 2 parts, I cannot see how the Assembly can morally proceed with future privatisations until employee protection is in place.

Financial and manpower implications

The consultation process in respect of this proposition is already underway. The only financial and manpower consequences for the States are in terms of drafting the relevant legislation in line with the proposition. The implementation of the legislation has no ongoing financial or manpower consequences for the States.

APPENDIX

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (S.I. 2006/246) (referred to below as TUPE 2006) is now the main piece of U.K. legislation governing the transfer of an undertaking, or part of one, to another. The regulations are designed to protect the rights of employees in a transfer situation enabling them to enjoy the same terms and conditions, with continuity of employment, as formerly.

TUPE 2006 entirely replaced the Transfer of Undertakings (Protection of Employment) Regulations 1981 (S.I.1981/1794) which have often been referred to as the TUPE regulations.

TUPE regulations were introduced to comply with relevant EC Directives concerning transfers of undertakings. The main Directives are:

- the Acquired Rights Directive (77/187/EC)
- the Acquired Rights Directive (98/50/EC)
- the Acquired Rights Amendment Directive (2001/23/EC).

In incorporating the original Acquired Rights Directive into the law of member states, a number of anomalies arose and there have been various amendments to the U.K. regulations and a great deal of case law. The most recent overhaul has been subject to an extremely prolonged consultation – some changes affecting pensions came into effect on 6 April 2005 and the core changes of TUPE 2006 came into force on 6 April 2006.

The regulations now ensure:

- more comprehensive application of the regulations to service provision situations where services are outsourced, insourced or assigned to a new contractor to achieve greater certainty that TUPE applies to labour-intensive services such as office cleaning, catering, security, and refuse collection
- the transferee is aware of the employees' rights, obligations and liabilities upon transfer
- clarification of the circumstances when the ETO defence (see below) can be applied to change the terms and conditions of employment and in which employers can lawfully make transfer-related dismissals
- that transfers of insolvent businesses are more viable by introducing greater flexibility to attract potential buyers
- the transferor and transferee jointly and severally liable for any failure to inform and consult with the transferring employees
- the territorial application of TUPE is extended so that overseas employees may also be caught by the transfer.

The further statutes and regulations which have an effect on TUPE are:

1. The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995 (S.I.1995/2587)
2. The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1999 (S.I.1999/1925)
3. Pensions Act 2004, especially sections 257 and 258
4. The Transfer of Employment (Pensions Protection) Regulations 2005 (S.I.2005/649)
5. The Department of Trade and Industry provide guidance for employers, employees and their representatives on the new regulations.

What is a relevant transfer of an undertaking?

TUPE will apply to what are known as 'relevant transfers' which may occur in a wide range of situations. The two broad categories are business transfers and service provisions changes. Some transfers will be both a business transfer and a service provision change.

Business transfers

The question here is whether there is a transfer of an economic entity that retains its identity. This can be broken into two parts:

- Is there a 'stable economic entity' that is capable of being transferred?
- Will the economic entity retain its identity after the transfer in question?

To decide if there is a stable economic entity that is capable of being transferred, the factors to consider include:

- Is the type of business being conducted by the transferee (incoming business) the same as the transferor's (outgoing business)?
- Has there been a transfer of tangible assets such as building and moveable property(although this is not essential)?
- What is the value of the intangible assets at the time of the transfer?
- Have the majority of employees been taken over by the new employer?
- Have the customers been transferred?
- What is the degree of similarity of the activities carried on before and after?

If the answer to all (or in some cases several of) the above questions is 'yes', it is safe to assume that there has been a transfer of a stable economic entity. The absence of a profit-motive is not a determinative factor.

Service provision changes

A service provision change occurs when a client who engages a contractor to do work on its behalf is either:

- reassigning such a contract, or
- bringing the work 'in-house' (a service provision change).

It will not be a service provision change if:

- the contract is wholly or mainly for the supply of goods for the client's use, or
- the activities are carried out in connection with a single specific event or a task of short-term duration.

In what situations does TUPE apply?

By way of broad guidance TUPE has been found to apply to:

- mergers
- sales of a businesses by sale of assets
- a change of licensee or franchisee
- the gift of a business through the execution of a will
- contracting out of services
- changing contractors
- where all or part of a sole trader's business or partnership is sold or otherwise transferred.

However, TUPE does not apply to:

- transfers by share take-over
- transfers of assets only (for example, the sale of equipment alone would not be covered, but the sale of a going concern including equipment would be covered)

- transfers of a contract to provide goods or services where this does not involve the transfer of a business or part of a business
- the supply of goods for a clients use, for example, supplying food to a client to sell in its staff canteen, rather than a situation where the contractor runs the canteen for the client
- transfers of undertakings situated outside the United Kingdom (although these may be covered by the regulations of other member states).

The law on relevant transfers in the case of contracting out and changes of contractors for labour intensive activities, such as security, catering, refuse collection and cleaning, has given rise to confusion in the past. Many of these difficulties have been resolved by TUPE 2006.

Impact of a breach of the TUPE regulations

If a TUPE transfer applies, all terms and conditions of work and continuity of employment should be preserved. This principle applies to all employees who were employed in the entity transferred immediately before the transfer; and those who would have been so employed if they had not been unfairly dismissed for a reason connected with the transfer.

Subject to a one year qualifying period, such a dismissal will be automatically unfair for a reason connected with the transfer unless it is for an ‘economic, technical or organisational’ (ETO) reason (see below).

The table below sets out three different categories of dismissal and whether they are fair or unfair.

Type of dismissal

Fair or unfair

Dismissals for which the sole or principal reason is the transfer itself, or a reason connected with the transfer that is not an ETO reason.

Automatically unfair under the unfair dismissal legislation.

Dismissals for which the sole or principal reason is not the transfer itself, but is a reason connected with the transfer that is an ETO reason.

Potentially fair subject to the normal test of reasonableness under the unfair dismissal legislation.

Dismissals for which the sole or principal reason is unconnected with the transfer.

These fall outside TUPE as they are unrelated to a relevant transfer and the usual unfair dismissal principles will apply. This is the case even though the dismissals may be made around the time of such a transfer.

Information

From 6 April 2006, transferors became obliged to give the transferee written information about the employees who are to transfer and all the associated rights and obligations towards them. This information includes, for example, the identity and age of the employees who will transfer, information contained in the employees’ written particulars of employment under section 1 of the Employment Rights Act 1996 and details of any claims that the transferor reasonably believes might be brought.

If the transferor does not provide this information, the transferee may apply to an employment tribunal for such amount as it considers just and equitable. Compensation starts at a minimum of £500 for each employee in respect of whom the information was not provided or was defective.

Consultation and notification

The transferor has a responsibility to conduct a full and meaningful consultation with employees at the earliest practicable time. Failure to conduct consultation results in liability for the payment of compensation which may be up to 13 weeks' pay. The transferor and transferee both liable for any award of compensation made by an employment tribunal for failure to inform and consult.

Liability passing on to the incoming contractor

The transferee takes over the liability for all statutory rights, claims and liabilities arising from the contract of employment, for example liabilities in tort, unfair dismissal and discrimination claims. The exception to this rule applies to criminal liabilities.

Pensions

Strictly speaking, obligations relating to provisions about benefits for old age, invalidity or survivors in employees' occupational pension schemes do not transfer under TUPE. However, the provisions of the Pensions Act 2004 sections 257 and 258 do apply to transfers taking place after 6 April 2005. In effect, this means that provisions equivalent to the TUPE regulations apply to pension rights from that date. In essence, if the previous employer provided a pension scheme then the new employer has to provide some form of pension arrangement for employees who were eligible for, or members of the old employer's scheme. It will not have to be the same as the arrangement provided by the previous employer but will have to be of a certain minimum standard specified under the Pensions Act.

Are there any 'defences' to prevent the TUPE regulations applying?

The economic, technical or organisational (ETO) reason relating to the entity which is being transferred is one of the few legitimate factors for the basis of a refusal to take on the transferor's workforce by the prospective transferee. The reason has to be the main cause of the dismissal, thus making the dismissal justifiable provided an employment tribunal decides that the employer acted reasonably in all circumstances. If it can be shown that the economic reasons were a 'sham' and that the workforce were not taken on in order to avoid the application of the TUPE regulations, then the transferee could be liable for potential claims.

Employees with less than one year's service cannot present claims under TUPE, as employment protection rights have not been accrued.

References

The Transfer of Undertakings (Protection of Employment) Regulations 2006. (2006) S.I.2006/246. London: HMSO. Available at <http://www.opsi.gov.uk/si/si200602.htm>

DEPARTMENT OF TRADE AND INDUSTRY. (2006) *Employment rights on the transfer of an undertaking: a guide to the 2006 TUPE Regulations for employees, employers and representatives*. London: DTI. Available at: <http://www.dti.gov.uk/files/file20761.pdf>