

1981 No. 1794

TERMS AND CONDITIONS OF EMPLOYMENT

**The Transfer of Undertakings (Protection of Employment)
Regulations 1981**

Laid before Parliament in draft

Made	- - - -	14th December 1981
Coming into Operation		
Regulations 1 to 3 and 10 to 13		1st February 1982
Regulations 4 to 9 and 14		1st May 1982

Whereas a draft of these Regulations has been approved by resolution of each House of Parliament in pursuance of paragraph 2(2) of Schedule 2 to the European Communities Act 1972(a):

Now, therefore, the Secretary of State, being a Minister designated for the purposes of section 2(2) of that Act in relation to rights and obligations relating to employers and employees on the transfer or merger of undertakings, businesses or parts of businesses(b), in exercise of the powers conferred by that section, hereby makes the following Regulations—

Citation, commencement and extent

1.—(1) These Regulations may be cited as the Transfer of Undertakings (Protection of Employment) Regulations 1981.

(2) These Regulations, except Regulations 4 to 9 and 14, shall come into operation on 1st February 1982 and Regulations 4 to 9 and 14 shall come into operation on 1st May 1982.

(3) These Regulations, except Regulations 11(10) and 13(3) and (4), extend to Northern Ireland.

Interpretation

2.—(1) In these Regulations—

“collective agreement”, “employers’ association”, and “trade union” have the same meanings respectively as in the 1974 Act or, in Northern Ireland, the 1976 Order;

“collective bargaining” has the same meaning as it has in the 1975 Act or, in Northern Ireland, the 1976 Order;

“contract of employment” means any agreement between an employee and his employer determining the terms and conditions of his employment;

“employee” means any individual who works for another person whether under a contract of service or apprenticeship or otherwise but does not

(a) 1972 c. 68.

(b) The European Communities (Designation) (No. 2) Order 1977 (S.I. 1977/1718).

include anyone who provides services under a contract for services and references to a person's employer shall be construed accordingly ;

"the 1974 Act", "the 1975 Act", "the 1978 Act" and "the 1976 Order" mean, respectively, the Trade Union and Labour Relations Act 1974 (a), the Employment Protection Act 1975 (b), the Employment Protection (Consolidation) Act 1978(c) and the Industrial Relations (Northern Ireland) Order 1976(d) ;

"recognised", in relation to a trade union, means recognised to any extent by an employer, or two or more associated employers, (within the meaning of the 1978 Act, or, in Northern Ireland, the 1976 Order), for the purpose of collective bargaining ;

"relevant transfer" means a transfer to which these Regulations apply and "transferor" and "transferee" shall be construed accordingly ; and

"undertaking" includes any trade or business but does not include any undertaking or part of an undertaking which is not in the nature of a commercial venture.

(2) References in these Regulations to the transfer of part of an undertaking are references to a transfer of a part which is being transferred as a business and, accordingly, do not include references to a transfer of a ship without more.

(3) For the purposes of these Regulations the representative of a trade union recognised by an employer is an official or other person authorised to carry on collective bargaining with that employer by that union.

A relevant transfer

3.—(1) Subject to the provisions of these Regulations, these Regulations apply to a transfer from one person to another of an undertaking situated immediately before the transfer in the United Kingdom or a part of one which is so situated.

(2) Subject as aforesaid, these Regulations so apply whether the transfer is effected by sale or by some other disposition or by operation of law.

(3) Subject as aforesaid, these Regulations so apply notwithstanding—

(a) that the transfer is governed or effected by the law of a country or territory outside the United Kingdom ;

(b) that persons employed in the undertaking or part transferred ordinarily work outside the United Kingdom ;

(c) that the employment of any of those persons is governed by any such law.

(4) It is hereby declared that a transfer of an undertaking or part of one may be effected by a series of two or more transactions between the same parties, but in determining whether or not such a series constitutes a single transfer regard shall be had to the extent to which the undertaking or part was controlled by the transferor and transferee respectively before the last transaction, to the lapse of time between each of the transactions, to the intention of the parties and to all the other circumstances.

(5) Where, in consequence (whether directly or indirectly) of the transfer of an undertaking or part of one which was situated immediately before

(a) 1974 c. 52. (b) 1975 c. 71.
(c) 1978 c. 44. (d) S.I. 1976/1043 (N.I. 16).

the transfer in the United Kingdom, a ship within the meaning of the Merchant Shipping Act 1894 (a) registered in the United Kingdom ceases to be so registered, these Regulations shall not affect the right conferred by section 5 of the Merchant Shipping Act 1970 (b) (right of seamen to be discharged when ship ceases to be registered in the United Kingdom) on a seaman employed in the ship.

Transfers by receivers and liquidators

4.—(1) Where the receiver of the property or part of the property of a company or, in the case of a creditors' voluntary winding up, the liquidator of a company transfers the company's undertaking, or part of the company's undertaking (the "relevant undertaking") to a wholly owned subsidiary of the company, the transfer shall for the purposes of these Regulations be deemed not to have been effected until immediately before—

(a) the transferee company ceases (otherwise than by reason of its being wound up) to be a wholly owned subsidiary of the transferor company ;
or

(b) the relevant undertaking is transferred by the transferee company to another person ;

whichever first occurs, and, for the purposes of these Regulations, the transfer of the relevant undertaking shall be taken to have been effected immediately before that date by one transaction only.

(2) In this Regulation—

"creditors' voluntary winding up" has the same meaning as in the Companies Act 1948(c) or, in Northern Ireland, the Companies Act (Northern Ireland) 1960(d) ; and

"wholly owned subsidiary" has the same meaning as it has for the purposes of section 150 of the Companies Act 1948 and section 144 of the Companies Act (Northern Ireland) 1960.

Effect of relevant transfer on contracts of employment, etc.

5.—(1) A relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor in the undertaking or part transferred but any such contract which would otherwise have been terminated by the transfer shall have effect after the transfer as if originally made between the person so employed and the transferee.

(2) Without prejudice to paragraph (1) above, on the completion of a relevant transfer—

(a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract, shall be transferred by virtue of this Regulation to the transferee ; and

(b) anything done before the transfer is completed by or in relation to the transferor in respect of that contract or a person employed in that undertaking or part shall be deemed to have been done by or in relation to the transferee.

(3) Any reference in paragraph (1) or (2) above to a person employed in an undertaking or part of one transferred by a relevant transfer is a reference to a person so employed immediately before the transfer, including, where

(a) 1894 c. 60. (b) 1970 c. 36. (c) 1948 c. 38. (d) 1960 c. 22 (N.I.).

the transfer is effected by a series of two or more transactions, a person so employed immediately before any of those transactions.

(4) Paragraph (2) above shall not transfer or otherwise affect the liability of any person to be prosecuted for, convicted of and sentenced for any offence.

(5) Paragraph (1) above is without prejudice to any right of an employee arising apart from these Regulations to terminate his contract of employment without notice if a substantial change is made in his working conditions to his detriment ; but no such right shall arise by reason only that, under that paragraph, the identity of his employer changes unless the employee shows that, in all the circumstances, the change is a significant change and is to his detriment.

Effect of relevant transfer on collective agreements

6. Where at the time of a relevant transfer there exists a collective agreement made by or on behalf of the transferor with a trade union recognised by the transferor in respect of any employee whose contract of employment is preserved by Regulation 5(1) above, then,—

- (a) without prejudice to section 18 of the 1974 Act or Article 63 of the 1976 Order (collective agreements presumed to be unenforceable in specified circumstances) that agreement, in its application in relation to the employee, shall, after the transfer, have effect as if made by or on behalf of the transferee with that trade union, and accordingly anything done under or in connection with it, in its application as aforesaid, by or in relation to the transferor before the transfer, shall, after the transfer, be deemed to have been done by or in relation to the transferee ; and
- (b) any order made in respect of that agreement, in its application in relation to the employee, shall, after the transfer, have effect as if the transferee were a party to the agreement.

Exclusion of occupational pensions schemes

7. Regulations 5 and 6 above shall not apply—

- (a) to so much of a contract of employment or collective agreement as relates to an occupational pension scheme within the meaning of the Social Security Pensions Act 1975(a) or the Social Security Pensions (Northern Ireland) Order 1975(b) ; or
- (b) to any rights, powers, duties or liabilities under or in connection with any such contract or subsisting by virtue of any such agreement and relating to such a scheme or otherwise arising in connection with that person's employment and relating to such a scheme.

Dismissal of employee because of relevant transfer

8.—(1) Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee shall be treated for the purposes of Part V of the 1978 Act and Articles 20 to 41 of the 1976 Order (unfair dismissal) as unfairly dismissed if the transfer or a reason connected with it is the reason or principal reason for his dismissal.

(a) 1975 c. 60.

(b) S.I. 1975/1503 (N.I. 15).

(2) Where an economic, technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after a relevant transfer is the reason or principal reason for dismissing an employee—

(a) paragraph (1) above shall not apply to his dismissal ; but

(b) without prejudice to the application of section 57(3) of the 1978 Act or Article 22(10) of the 1976 Order (test of fair dismissal), the dismissal shall for the purposes of section 57(1)(b) of that Act and Article 22(1)(b) of that Order (substantial reason for dismissal) be regarded as having been for a substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held.

(3) The provisions of this Regulation apply whether or not the employee in question is employed in the undertaking or part of the undertaking transferred or to be transferred.

(4) Paragraph (1) above shall not apply in relation to the dismissal of any employee which was required by reason of the application of section 5 of the Aliens Restriction (Amendment) Act 1919(a) to his employment.

Effect of relevant transfer on trade union recognition

9.—(1) This Regulation applies where after a relevant transfer the undertaking or part of the undertaking transferred maintains an identity distinct from the remainder of the transferee's undertaking.

(2) Where before such a transfer an independent trade union is recognised to any extent by the transferor in respect of employees of any description who in consequence of the transfer become employees of the transferee, then, after the transfer—

(a) the union shall be deemed to have been recognised by the transferee to the same extent in respect of employees of that description so employed; and

(b) any agreement for recognition may be varied or rescinded accordingly.

Duty to inform and consult trade union representatives

10.—(1) In this Regulation and Regulation 11 below “an affected employee” means, in relation to a relevant transfer, any employee of the transferor or the transferee (whether or not employed in the undertaking or the part of the undertaking to be transferred) who may be affected by the transfer or may be affected by measures taken in connection with it; and references to the employer shall be construed accordingly.

(2) Long enough before a relevant transfer to enable consultations to take place between the employer of any affected employees of a description in respect of which an independent trade union is recognised by him and that union's representatives, the employer shall inform those representatives of—

(a) the fact that the relevant transfer is to take place, when, approximately, it is to take place and the reasons for it ; and

(b) the legal, economic and social implications of the transfer for the affected employees ; and

- (c) the measures which he envisages he will, in connection with the transfer, take in relation to those employees or, if he envisages that no measures will be so taken, that fact ; and
- (d) if the employer is the transferor, the measures which the transferee envisages he will, in connection with the transfer, take in relation to such of those employees as, by virtue of Regulation 5 above, become employees of the transferee after the transfer or, if he envisages that no measures will be so taken, that fact.

(3) The transferee shall give the transferor such information at such a time as will enable the transferor to perform the duty imposed on him by virtue of paragraph (2)(d) above.

(4) The information which is to be given to the representatives of a trade union under this Regulation shall be delivered to them, or sent by post to an address notified by them to the employer, or sent by post to the union at the address of its head or main office.

(5) Where an employer of any affected employees envisages that he will, in connection with the transfer, be taking measures in relation to any such employees of a description in respect of which an independent trade union is recognised by him, he shall enter into consultations with the representatives of that union.

(6) In the course of those consultations the employer shall—

- (a) consider any representations made by the trade union representatives ; and
- (b) reply to those representations and, if he rejects any of those representations, state his reasons.

(7) If in any case there are special circumstances which render it not reasonably practicable for an employer to perform a duty imposed on him by any of the foregoing paragraphs, he shall take all such steps towards performing that duty as are reasonably practicable in the circumstances.

Failure to inform or consult

11.—(1) A complaint that an employer has failed to inform or consult a representative of a trade union in accordance with Regulation 10 above may be presented to an industrial tribunal by that union.

(2) If on a complaint under paragraph (1) above a question arises whether or not it was reasonably practicable for an employer to perform a particular duty or what steps he took towards performing it, it shall be for him to show—

- (a) that there were special circumstances which rendered it not reasonably practicable for him to perform the duty ; and
- (b) that he took all such steps towards its performance as were reasonably practicable in those circumstances.

(3) On any such complaint against a transferor that he had failed to perform the duty imposed upon him by virtue of paragraph (2)(d) or, so far as relating thereto, paragraph (7) of Regulation 10 above, he may not show that it was not reasonably practicable for him to perform the duty in question for the reason that the transferee had failed to give him the requisite information at the requisite time in accordance with Regulation 10(3) above unless he

gives the transferee notice of his intention to show that fact ; and the giving of the notice shall make the transferee a party to the proceedings.

(4) Where the tribunal finds a complaint under paragraph (1) above well-founded it shall make a declaration to that effect and may—

- (a) order the employer to pay appropriate compensation to such descriptions of affected employees as may be specified in the award ; or
- (b) if the complaint is that the transferor did not perform the duty mentioned in paragraph (3) above and the transferor (after giving due notice) shows the facts so mentioned, order the transferee to pay appropriate compensation to such descriptions of affected employees as may be specified in the award.

(5) An employee may present a complaint to an industrial tribunal on the ground that he is an employee of a description to which an order under paragraph (4) above relates and that the transferor or the transferee has failed, wholly or in part, to pay him compensation in pursuance of the order.

(6) Where the tribunal finds a complaint under paragraph (5) above well-founded it shall order the employer to pay the complainant the amount of compensation which it finds is due to him.

(7) Where an employer, in failing to perform a duty under Regulation 10 above, also fails to comply with the requirements of section 99 of the 1975 Act or Article 49 of the 1976 Order (duty of employer to consult trade union representatives on redundancy)—

- (a) any compensation awarded to an employee under this Regulation shall go to reduce the amount of remuneration payable to him under a protective award subsequently made under Part IV of that Act or Part IV of that Order and shall also go towards discharging any liability of the employer under, or in respect of a breach of, the contract of employment in respect of a period falling within the protected period under that award ; and
- (b) conversely any remuneration so payable and any payment made to the employee by the employer under, or by way of damages for breach of, that contract in respect of a period falling within the protected period shall go to reduce the amount of any compensation which may be subsequently awarded under this Regulation ;

but this paragraph shall be without prejudice to section 102(3) of that Act and Article 52(3) of that Order (avoidance of duplication of contractual payments and remuneration under protective awards).

(8) An industrial tribunal shall not consider a complaint under paragraph (1) or (5) above unless it is presented to the tribunal before the end of the period of three months beginning with—

- (a) the date on which the relevant transfer is completed, in the case of a complaint under paragraph (1) ;
- (b) the date of the tribunal's order under paragraph (4) above, in the case of a complaint under paragraph (5) ;

or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of the period of three months.

(9) Section 129 of the 1978 Act (complaint to be sole remedy for breach of relevant rights) and section 133 of that Act (functions of conciliation officer) and Articles 58(2) and 62 of the 1976 Order (which make correspond-

ing provision for Northern Ireland) shall apply to the rights conferred by this Regulation and to proceedings under this Regulation as they apply to the rights conferred by that Act or that Order and the industrial tribunal proceedings mentioned therein.

(10) An appeal shall lie and shall lie only to the Employment Appeal Tribunal on a question of law arising from any decision of, or arising in any proceedings before, an industrial tribunal under or by virtue of these Regulations ; and section 13(1) of the Tribunals and Inquiries Act 1971(a) (appeal from certain tribunals to the High Court) shall not apply in relation to any such proceedings.

(11) In this Regulation “ appropriate compensation ” means such sum not exceeding two weeks’ pay for the employee in question as the tribunal considers just and equitable having regard to the seriousness of the failure of the employer to comply with his duty.

(12) Schedule 14 to the 1978 Act or, in Northern Ireland, Schedule 2 to the 1976 Order shall apply for calculating the amount of a week’s pay for any employee for the purposes of paragraph (11) above ; and, for the purposes of that calculation, the calculation date shall be—

- (a) in the case of an employee who is dismissed by reason of redundancy (within the meaning of section 81 of the 1978 Act or, in Northern Ireland, section 11 of the Contracts of Employment and Redundancy Payments Act (Northern Ireland) 1965(b)) the date which is the calculation date for the purposes of any entitlement of his to a redundancy payment (within the meaning of that section) or which would be that calculation date if he were so entitled ;
- (b) in the case of an employee who is dismissed for any other reason, the effective date of termination (within the meaning of section 55 of the 1978 Act or, in Northern Ireland, Article 21 of the 1976 Order) of his contract of employment ;
- (c) in any other case, the date of the transfer in question.

Restriction on contracting out

12. Any provision of any agreement (whether a contract of employment or not) shall be void in so far as it purports to exclude or limit the operation of Regulation 5, 8 or 10 above or to preclude any person from presenting a complaint to an industrial tribunal under Regulation 11 above.

Exclusion of employment abroad or as dock worker

13.—(1) Regulations 8, 10 and 11 of these Regulations do not apply to employment where under his contract of employment the employee ordinarily works outside the United Kingdom.

(2) For the purposes of this Regulation a person employed to work on board a ship registered in the United Kingdom shall, unless—

- (a) the employment is wholly outside the United Kingdom, or
- (b) he is not ordinarily resident in the United Kingdom,

be regarded as a person who under his contract ordinarily works in the United Kingdom.

(3) Nothing in these Regulations applies in relation to any person employed as a registered dock worker unless he is wholly or mainly engaged in work which is not dock work.

(4) Paragraph (3) above shall be construed as if it were contained in section 145 of the 1978 Act.

Consequential amendments

14.—(1) In section 4(4) of the 1978 Act (written statement to be given to employee on change of his employer), in paragraph (b), the reference to paragraph 17 of Schedule 13 to that Act (continuity of employment where change of employer) shall include a reference to these Regulations.

(2) In section 4(6A) of the Contracts of Employment and Redundancy Payments Act (Northern Ireland) 1965, in paragraph (b), the reference to paragraph 10 of Schedule 1 to that Act shall include a reference to these Regulations.

Signed by order of the Secretary of State.

14th December 1981.

David Waddington.

Joint Parliamentary Under Secretary of State,
Department of Employment.

EXPLANATORY NOTE

(This Note is not part of the Regulations.)

These Regulations implement Council Directive No. 77/187/EEC.

Regulations 1 to 3 and 10 to 13 come into operation on 1st February 1982 and Regulations 4 to 9 and 14 on 1st May 1982. The principal provisions of the Regulations are as follows:—

- (a) The Regulations apply where a person transfers a commercial undertaking or part thereof to another person (Regulation 3).
- (b) Such a transfer will not operate to terminate the employees' contracts of employment but any such contract which would otherwise have been terminated by the transfer will continue as if made between the transferee and the employees (Regulation 5). Provision is made for the continuance of collective agreements (Regulation 6). Regulations 5 and 6 do not apply to occupational pension schemes (Regulation 7).
- (c) Provision is made for the application of the remedies for unfair dismissal contained in the existing law where an employee of the transferor or transferee is dismissed by reason of the transfer (Regulation 8).
- (d) A trade union recognised by the transferor is deemed after a transfer to be similarly recognised by the transferee (Regulation 9).
- (e) The representatives of the employees who may be affected by the transfer are to be informed by the transferor and the transferee of the date of and the reasons for the transfer and its implications for them. Where the transferor or the transferee envisages that he will be taking measures in relation to the affected employees, he must enter into consultation with the said representatives (Regulation 10). A complaint may be presented to an industrial tribunal that these duties have not been performed and the tribunal may award compensation (Regulation 11).

SI 1981/1794
ISBN 0-11-017794-0



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