Royal College of Nursing

Government consultation – TUPE & European Works Councils

20th May to 11th July 2024

RCN Response

Reply to Proposal 1: Amending the definition of “Employee” in the TUPE Regulations

I. The effect of Dewhurst v Revisecatch

What effect has the ruling in the case of Dewhurst v Revisecatch (that TUPE applies to workers) had on employers or workers?

1. The RCN welcomed the ruling in Dewhurst in which the Tribunal decided that the definition of employee encompasses “limb b” workers for the purposes of the TUPE Regulations.

2. However, employment status is often in issue in our experience, for example holiday pay, notice pay and deductions from wages claims irrespective of the TUPE issue.

3. The decision has no effect where an employer disputes even the worker status and tries to argue that the member is in reality “self-employed.”

II. Excluding “workers” from the definition of “Employee”

Do you agree that the government should amend the definition of ‘employee’ in the TUPE regulations to confirm the generally accepted principle that the regulations apply to ‘employees’ but not ‘workers’?

The RCN represents members in the Employment Tribunals and has experience of pursuing claims where members are not informed or consulted, dismissed, or have their terms and conditions changed following a change of employer.

The RCN opposes in principle this proposal which it views as removing rights from working people.

The RCN does not agree that the government should amend the definition of employee in the TUPE regulations Workers already have limited employment rights, in particular there is no right not to be unfairly dismissed. Workers who do not qualify as employees are already in a more precarious position with job security, and many of them are low paid. Therefore, the protection provided by Dewhurst should be preserved.

III. Amending the definition of "employee"

Do you think that the government's proposal to amend the definition of 'employee' in the TUPE regulations by explicitly stating that limb (b) workers are excluded is the best way to achieve this?

1. No. For the reason given above.

2. In any case, legislation would not solve the common dispute of determining the true contractual status of a worker, as some employers refute worker employment status by denying their contract is an employment contract or giving it a different "label" when in reality the relationship between the contracting parties is one of employer and employee.

3. A better amendment to the TUPE regulations would be to follow the Dewhurst judgment and confirm limb B workers are employees for the purpose of the Regulations.

IV. Any other evidence of the impact of the proposals?

Reply to Proposal 2: Preventing Employment Contracts being transferred to more than one transferee under TUPE

V. The effect of the *Govaerts* ruling

What effect has the ruling in the case of ISS Facility Services NV v Govaerts and Atalian NV had on how the TUPE regulations work?

1. The European Court of Justice judgment in the *Govaerts* case qualified its judgment that the rights and obligations of an employment contract transfer to all transferees where the duties immediately before the transfer are taken over by more than one transferee by stating,

   "Provided that the division of the contract of employment as a result of the transfer is possible and neither causes a worsening of working conditions nor adversely affects the safeguarding of the rights of workers guaranteed by that directive."

2. Prior to the *Govaerts* judgment, any TUPE transfer where a worker's contractual duties transferred to more than one transferee involved an exercise in determining which transferee takes over the greater part of the activities that were carried out before the transfer.

3. Following *Govaerts*, this exercise may not be necessary provided a division to more than one transferee: -
    (a) is possible
    (b) does not cause a worsening of working conditions; and
    (c) does not adversely affect the rights of the worker

4. The *Govaerts* judgment widens the scope of how a TUPE transfer can operate. It is up to the parties to the transfer to agree between themselves and with the employees and their unions/representatives how the division upon transfer will operate. In other words, the judgment provides more flexibility to the parties.

5. Where there is more than one transferee, the possibility of liability for a dismissal being divided amongst all transferees could give all transferees the incentive to ensure agreement between all relevant parties on what will happen to the employment contracts of workers affected by the transfer and make it less likely that any of the transferees can assume they can wash their hands of any responsibility.

6. Following the *Govaerts* judgment, in 2021, the Employment Appeal Tribunal in the case of *McTear Contracts Ltd & others v Bennett & others [UKEATS/0023/19/SS]* found that

"There is no reason in principle why an employee may not, following such a transfer, hold two or more contracts of employment with different employers at the same time, provided that the work attributable to each contract is clearly separate from the work on the other(s) and is identifiable as such. The division, on geographical lines, of work previously carried out under a single contract into two new contracts is, in principle, a situation where there could properly be found to be different employers on different jobs."

VI. Prevalence of TUPE transfers to multiple transferees

In your experience, how common are TUPE transfers involving multiple transferees, and what are the practical considerations that arise from these?

1. The numbers of TUPE cases we litigate is too low to give a statistically meaningful reply.

2. As a Union we do occasionally represent members whose employment has been terminated following a transfer of a service to more than one transferee.

3. In 2023, TUPE cases accounted for less than 1% of RCN Employment cases, and of these 14% involved multiple transferees.

4. In most cases that we deal with, the member's employment has been terminated, and the issue before the Employment Tribunal is which party/parties is/are liable for the dismissal.

5. We litigate cases for members when the transferees do not want to accept the member's employment contract and so deny that there has been a TUPE transfer. In such cases, a case is brought against all transferees and the transferor to protect our member's interests where there is a possibility of any of the transferees (and the transferor) being liable.

6. The RCN's approach of including all the transferees as Respondents in the litigation is unaffected by the *Govaerts* judgment. Whilst we put forward the evidence that a TUPE transfer has taken place, the transferor and transferees make their case for which of them should be liable.

VII. Proposal for legislation to prevent splitting contracts during a TUPE transfer

Do you agree that the government should legislate to prevent employment contracts being 'split' between multiple transferees during a TUPE transfer, reverting to the generally accepted principle that existed prior to the *Govaerts* ruling?

1. The RCN opposes this proposal which it views as unreasonably restricting the flexibility of parties to a transfer to come to a solution which in some cases could preserve employment which might otherwise end.

2. It also restricts an Employment Tribunal's options when determining a just apportionment of liability, when an employee is dismissed as a result of a TUPE transfer.

3. This question seems to assume that the judgment requires contracts to be "split" during a transferee to multiple transferees. That is not the case if such a split is not possible or adversely affects the worker's contract.

4. In fact, following the judgment in the case of *McTear Contracts Ltd & others v Bennett & others* (see above) in the Employment Appeal Tribunal when the case was remitted to the original Employment Tribunal to consider the application of *Govaerts* to each Claimant, the Employment Tribunal after considering the *Govaerts* judgment decided that the contracts did not transfer to multiple transferees.

5. In practice, following a TUPE consultation, as long as the parties to a transfer agree, and employee rights are protected, no one is going to litigate, and an Employment Tribunal will not interfere with the solution reached through the consultation process.

6. The *Govaerts* ruling gives more flexibility to parties who comply with their consultation duties and more incentive for all parties in a transfer to several transferees to ensure agreement is reached (see above).

7. To legislate in the way proposed would: -

   (a) narrow the options available to parties to agree a solution when an employment contract is affected by a transfer to more than one transferee.
   (b) reduce the incentive on all parties to agree, and;
   (c) narrow the scope of an Employment Tribunal when determining the remedy following a dismissal or other breach of contract to apportion liability fairly.

VIII. Other Evidence of Impacts

We have analysed the potential impacts of this proposal in the annex of this consultation. Are you aware of any other evidence to inform our analysis of impacts?

1. In the Health Sector, nursing and Care Home businesses sometimes tender individual homes for sale. Staff (both specialist occupations and nursing support staff) are sometimes required to work in several homes and the sale of one of them could lead to a situation where a split of their contracts may be the best option.

2. Services employing nursing staff can be contracted out and service provision changes can affect nursing staff whose jobs cover more than one service, or (more commonly) more than one geographical area, where a split of their contracts may be the best option.

Reply to Proposal 3: Abolishing the Legal Framework for European Works Councils (EWCs) in the UK

IX. **Do you agree or disagree that the government should legislate to abolish the legal framework for EWCs?**

Strongly disagree

X. **Are there any other options the Government should consider instead of abolishing the legal framework for EWCs?**

Instead of completely abolishing EWCs, the government should examine other methods, keeping these noted benefits in mind, to address the concerns raised:

1. **Making Domestic Frameworks More Effective and Complementary**
   Strengthening and integration of domestic frameworks such as trade unions,

among other representative bodies of employees, with the EWC structures, would ensure seamless and strong representation of workers without duplication of effort or causing a high additional cost.

2. Transitional Arrangements
   Set transitional arrangements under which an already established EWC would continue to work effectively and smoothly adjust itself to the post-Brexit reality. This could include arrangements for phased changes or targeted support measures towards companies.
3. Voluntary Continuation
   Encourage, if need be, through incentives or assistance, companies to voluntarily keep in place the EWC-like structures or similar fora for transnational worker representation. This respects business autonomy while promoting ongoing employee engagement.

XI. **We have analysed the potential impacts of this proposal in the Annex of this consultation. Are you aware of any other evidence to inform our analysis of impacts?**

1. Preserving Employee Voice in Multinational Companies - EWCs serve as a crucial platform for employees in multinational companies to engage in dialogue with management about transnational issues. Abolishing EWCs would undermine this avenue for workers to express their views and participate in discussions affecting their working conditions and future.
2. Impact on Worker Representation and Rights - EWCs form an established channel to enforce a right for UK workers, in association with their European peers. If this balance of influence was shifted it could weaken the representation of UK workers in multinational companies with probable less influence on strategic business decisions.
3. Business continuity and Relations - For businesses operating in the UK and the EU, the existing EWC structure provides them with cohesiveness and continuation in employment relations. The eradication of the existing mechanism for another regulatory arrangement may cause a lack of cohesiveness in communication and disrupt the healthy relationships developed between the employees and management over time, thus providing the business with a healthy and effective business.
4. Economic and Competitive Disadvantages - Abolishing the EWC will mean a competitive disadvantage for all companies with operations in the UK trying to attract and retain talent. Good representation, influence on corporate decisions, employee engagement, and support from an employee perspective is essential, and the abolition of the EWC will signal a reduction in the levels given to corporate choices in and about companies based out of the UK.
5. Evidence to consider – There are far-reaching implications of abolition to the framework of the EWC that the government will want to consider

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carefully. We would urge the government to consider the following evidence:

5.1 **Case Studies on Benefits of EWC -** The RCN believe there will be cases that help to demonstrate the EWC has reinforced and enhanced the communication and understanding regarding the workers and managers of multinational companies, where the decision effectiveness and outcomes in business increase.

5.2 **Comparative Analysis with EU Practices** - A comparative analysis of how such structures in the EU have continued to help the workers and the businesses as well can provide suitable inference about the removal of the EWC framework from the UK.