STATUTORY RULES OF NORTHERN IRELAND

2006 No. 177

EMPLOYMENT

The Service Provision Change (Protection of Employment) Regulations (Northern Ireland) 2006

Made - - - -	*3rd April 2006*
Coming into operation	*6th April 2006*

The Department for Employment and Learning(**1**) makes the following Regulations in exercise of the powers conferred on it by section 2(2) of the European Communities Act 1972(**2**) (being a Department designated for the purposes of that section in relation to rights and obligations relating to employers and employees on the transfer or merger of undertakings, businesses or parts of businesses(**3**)) and Articles 37(2) and 39(3) of the Employment Relations (Northern Ireland) Order 1999(**4**), and now vested in it(**5**):

Citation and commencement

1. These Regulations may be cited as the Service Provision Change (Protection of Employment) Regulations (Northern Ireland) 2006 and shall come into operation on 6th April 2006.

Interpretation

2.—(1) In these Regulations—

"assigned" means assigned other than on a temporary basis;

"collective agreement", "collective bargaining" and "trade union" have the same meanings respectively as in the 1992 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 include anyone who provides services under a contract for services and references to a person's employer shall be construed accordingly;

(**1**) Formerly the Department of Higher and Further Education, Training and Employment; *see*2001 c. 15 (N.I.)
(**2**) 1972 c. 68
(**3**) *See* the European Communities (Designation) (No.2) Order 1977 (S.I. 1977/1718)
(**4**) S.I. 1999/2790 (N.I. 9)
(**5**) *See*S.R. 1999 No. 481

"insolvency practitioner" has the meaning given to the expression by Article 3 of the Insolvency (Northern Ireland) Order 1989(**6**);

"recognised" has the meaning given to the expression by Article 39(2) of the 1992 Order;

"service provision change" means a service provision change to which these Regulations apply by virtue of regulations 3 and 21;

"the transferor" in relation to any service provision change means the person who carried out the activities to which the change relates prior to that change and "transferee" means the person who carries out the activities as a result of the change;

"the 1992 Order" means the Industrial Relations (Northern Ireland) Order 1992(**7**);

"the 1996 Order" means the Employment Rights (Northern Ireland) Order 1996(**8**);

"the 1996 Tribunals Order" means the Industrial Tribunals (Northern Ireland) Order 1996(**9**).

(2) In these Regulations, references to "organised grouping of employees" shall include a single employee.

(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 trade union.

(4) The Interpretation Act (Northern Ireland) 1954 (**10**) shall apply to these Regulations as it applies to an Act of the Northern Ireland Assembly.

Service provision change

3.—(1) These Regulations apply to a service provision change, that is a situation in which—

(a) activities cease to be carried out by a person ("a client") on his own behalf and are carried out instead by another person on the client's behalf ("a contractor");

(b) activities cease to be carried out by a contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person ("a subsequent contractor") on the client's behalf; or

(c) activities cease to be carried out by a contractor or a subsequent contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by the client on his own behalf,

and in which the conditions set out in paragraph (2) are satisfied.

(2) The conditions referred to in paragraph (1) are that—

(a) immediately before the service provision change—

(i) there is an organised grouping of employees situated in Northern Ireland which has as its principal purpose the carrying out of the activities concerned on behalf of the client;

(ii) the client intends that the activities will, following the service provision change, be carried out by the transferee other than in connection with a single specific event or task of short-term duration; and

(b) the activities concerned do not consist wholly or mainly of the supply of goods for the client's use.

(3) Subject to paragraph (1), these Regulations apply to—

(**6**) S.I. 1989/2405 (N.I. 19)
(**7**) S.I. 1992/807 (N.I. 5)
(**8**) S.I. 1996/1919 (N.I. 16)
(**9**) S.I. 1996/1921 (N.I. 18)
(**10**) 1954 c. 33 (N.I.)

(a) public and private undertakings engaged in economic activities whether or not they are operating for gain;

(b) a service provision change howsoever effected notwithstanding—

(i) that the service provision change is governed or effected by the law of a country or territory outside Northern Ireland;

(ii) that the employment of persons employed in the organised grouping of employees, is governed by any such law;

(c) a service provision change where persons employed in the business or part transferred ordinarily work outside the United Kingdom.

(4) An administrative reorganisation of public administrative authorities or the transfer of administrative functions between public administrative authorities is not a service provision change.

(5) A service provision change—

(a) may be effected by a series of two or more transactions; and

(b) may take place whether or not any property is transferred to the transferee by the transferor.

(6) In this regulation "contractor" includes a sub-contractor.

Effect of service provision change on contracts of employment

4.—(1) Except where objection is made under paragraph (7), a service provision change shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the service provision change, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.

(2) Without prejudice to paragraph (1), but subject to paragraph (6), and regulations 8 and 15(9), on the completion of a service provision change—

(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) any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.

(3) Any reference in paragraph (1) to a person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to a service provision change, is a reference to a person so employed immediately before the change, or who would have been so employed if he had not been dismissed in the circumstances described in regulation 7(1), including, where the change is effected by a series of two or more transactions, a person so employed and assigned or who would have been so employed and assigned immediately before any of those transactions.

(4) Subject to regulation 9, in respect of a contract of employment that is, or will be, transferred by paragraph (1), any purported variation of the contract shall be void if the sole or principal reason for the variation is—

(a) the transfer itself; or

(b) a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce.

(5) Paragraph (4) shall not prevent the employer and his employee, whose contract of employment is, or will be, transferred by paragraph (1), from agreeing a variation of that contract if the sole or principal reason for the variation is—

(a) a reason connected with the transfer that is an economic, technical or organisational reason entailing changes in the workforce; or

(b) a reason unconnected with the transfer.

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

(7) Paragraphs (1) and (2) shall not operate to transfer the contract of employment and the rights, powers, duties and liabilities under or in connection with it of an employee who informs the transferor or the transferee that he objects to becoming employed by the transferee.

(8) Subject to paragraphs (9) and (11), where an employee so objects, the service provision change shall operate so as to terminate his contract of employment with the transferor but he shall not be treated, for any purpose, as having been dismissed by the transferor.

(9) Subject to regulation 9, where a service provision change involves or would involve a substantial change in working conditions to the material detriment of a person whose contract of employment is or would be transferred under paragraph (1), such an employee may treat the contract of employment as having been terminated, and the employee shall be treated for any purpose as having been dismissed by the employer.

(10) No damages shall be payable by an employer as a result of a dismissal falling within paragraph (9) in respect of any failure by the employer to pay wages to an employee in respect of a notice period which the employee has failed to work.

(11) Paragraphs (1), (7), (8) and (9) are without prejudice to any right of an employee arising apart from these Regulations to terminate his contract of employment without notice in acceptance of a repudiatory breach of contract by his employer.

Effect of service provision change on collective agreements

5. Where at the time of a service provision change 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 4(1) above, then—

(a) without prejudice to Article 26 of the 1992 Order (collective agreements presumed to be unenforceable in specified circumstances) that agreement, in its application in relation to the employee, shall, after the change, 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 in relation to the employee, by or in relation to the transferor before the change, shall, after the change, 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 change, have effect as if the transferee were a party to the agreement.

Effect of service provision change on trade union recognition

6.—(1) This regulation applies where, after a service provision change, the organised grouping of resources or employees to which the change relates maintains an identity distinct from the remainder of the transferee's undertaking.

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

(a) the trade 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.

Dismissal of employee because of service provision change

7.—(1) Where either before or after a service provision change, any employee of the transferor or transferee is dismissed, that employee shall be treated for the purposes of Part XI of the 1996 Order (unfair dismissal) as unfairly dismissed if the sole or principal reason for his dismissal is—

(a) the transfer itself; or

(b) a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce.

(2) This paragraph applies where the sole or principal reason for the dismissal is a reason connected with the transfer that is an economic, technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after a service provision change.

(3) Where paragraph (2) applies—

(a) paragraph (1) shall not apply;

(b) without prejudice to the application of Article 130(4) of the 1996 Order (test of fair dismissal), the dismissal shall, for the purposes of Articles 130(1) and 170 of that Order (reason for dismissal), be regarded as having been for redundancy where Article 130(2)(c) of that Order applies, or otherwise for a substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held.

(4) The provisions of this regulation apply irrespective of whether the employee in question is assigned to the organised grouping of resources or employees that is, or will be, transferred.

(5) Paragraph (1) 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(**11**) to his employment.

(6) Paragraph (1) shall not apply in relation to a dismissal of an employee if the application of Article 126 of the 1996 Order to the dismissal of the employee is excluded by or under any provision of that Order, the 1996 Tribunals Order or the Trade Union and Labour Relations (Consolidation) Act 1992(**12**) insofar as it extends to Northern Ireland, the 1992 Order or the Trade Union and Labour Relations (Northern Ireland) Order 1995(**13**).

Insolvency

8.—(1) If at the time of a service provision change the transferor is subject to relevant insolvency proceedings paragraphs (2) to (6) apply.

(2) In this regulation "relevant employee" means an employee of the transferor—

(a) whose contract of employment transfers to the transferee by virtue of the operation of these Regulations; or

(b) whose employment with the transferor is terminated before the time of the service provision change in the circumstances described in regulation 7(1).

(3) The relevant statutory scheme specified in paragraph (4)(b) shall apply in the case of a relevant employee irrespective of the fact that the qualifying requirement that the employee's employment has been terminated is not met and for those purposes the date of the transfer shall be treated as the date of the termination and the transferor shall be treated as the employer.

(4) In this regulation the "relevant statutory schemes" are—

(a) Chapter VI of Part XII of the 1996 Order;

(**11**) 1919 c. 92; section 5 was amended by the Former Enemy Aliens (Disabilities Removal) Act 1925 section 1 and Schedule 2, the Merchant Shipping Act 1970 section 100(3) and Schedule 5 and the Merchant Shipping Act 1995 section 314 and Schedule 12.
(**12**) 1992 c. 52
(**13**) S.I. 1995/1980 (N.I. 12)