SIPTU

Services Industrial Professional & Technical Union

Transfer of Undertakings Regulations 2003

Roisin Boyle – Legal Rights Unit

Legislation

2001

Council Directive 2001/23/EC ([2001] O.J.L82/16) (“the TUPE Regs”)

2003

The European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 (S.I. No. 131 of 2003)

"Any transfer of an undertaking, business or part of an undertaking or any business from one employer to another employer as a result of a legal transfer (including the assignment of forfeiture of a lease) or merger." – Regulation 3

In practice

1. A transfer means the transfer of an economic entity which retains its identity

2. An economic entity means an organised grouping of resources which has the objective of pursuing an economic activity

3. A transfer results in a change of employer which is a change in the natural or legal person responsible for employment (transferee / transferor)

Clarifications – Regulation 3

- The Regulations do not apply to a share sale, insolvent companies or sea – going vessels

- The Regulations do apply to outsourcing but assets must also transfer if employees are rejected

- The economic entities involved in the transfer do not need to be operating for gain (can be not for profit)

- The reorganisation or transfer of public administrative functions is not considered a transfer

Employees – Regulation 4

The Regulations apply to those employees wholly or mainly employed on the date the transfer

Must be employees not independent contractors

If FTW's, must not have expired prior to the date of the transfer

If FTW's, then transfer until expiry of contract

Beware of employee's being dismissed or resigning in the lead up to the transfer

***Adina Predut v Rapier Contract Services Limited* (2019)**

The Labour Court found that an employee terminated her own employment when she refused to transfer to a new employer under the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 ("TUPE Regulations").

Protections for Employee's – T&C's

Rights and obligations under a contract of employment transfer (service, bonus, leave etc)

They must exist on the date of the transfer – union involvement is important here

Terms, conditions and representatives within a Collective Agreement also transfer – until its expiry or it is replaced

Does not apply to Pension Rights

Protections of Employee's – Dismissal – Regulation 5

Dismissal on the grounds of the transfer is prohibited – before and after the transfer

Unless dismissal is for a economic, technical or organisational reason

Redundancy procedures should still apply

Substantial changes to terms and conditions could amount to constructive dismissal

ETO Reasons

Economic grounds are those which concern the profitability or market performance of the business post-transfer and the cost of running the business

Technical grounds are those concerned with a need for different technical skills which will be required in running the business post transfer

Organisational reasons refer to reorganisation of the work done such that it is different in some structural, departmental, administrative or managerial way

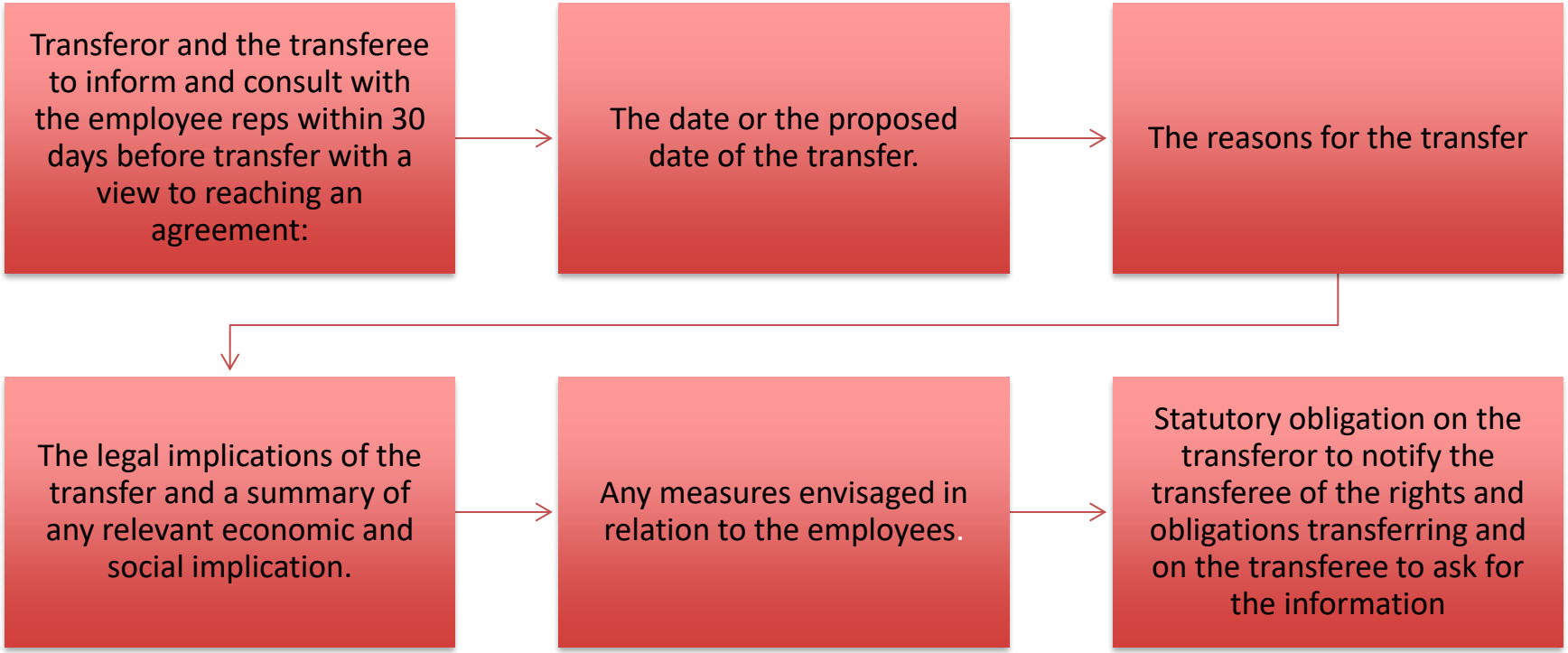
ETO Reasons

Two-limb test:

The employer must establish an economic, technical or organisational reason. The employer could rely, for example, on cost-saving requirements (economic), automation of processes (technical) or restructuring needs due to post-transfer overstaffing (organisational).

The reason must also "entail changes in the workforce". UK Case law has established that "changes in the workforce" means a change in the number of employees or in the functions which they perform (*Delabole Slate Co Ltd v Berriman* [1985] IRLR 305).

Protection of Employee's – Inform & Consult – Regulation 8



Redress – Regulation 10

Complaint to the Workplace Relations Commission (WRC)

Must be within 6 months from the date of the contravention (not always the transfer)

Complaint can be upheld, specific course of action ordered or award of compensation (Reg 8 - 4 weeks / Reg 5 - 2 years)

Always lodged against both transferee and transferor

Various parallel claims can apply



SIPTU

Organising for Fairness at Work
and Justice in Society