

There are also uncertainties about whether service provision changes involving professional business services (such as lawyers, accountants, surveyors and management consultants) will be exempt from TUPE. Comments are sought during consultation.



### Changing terms of employment

Currently, TUPE voids all changes in terms and conditions of employment made for reasons connected with the TUPE transfer, even if the employee consents to the alteration. The government wants to make it easier to effect such changes. However, the revised regulations as presently drafted will inevitably result in employment tribunal claims.

The proposal is that changes agreed with employees will be permissible – even though they are transfer-related – if they are for an economic, technical or organisational (ETO) reason entailing a change in the workforce. However, given existing case law, the ‘entailing a change in the workforce’ requirement would seem to rule out making transfer-related amendments to employment conditions in order to harmonise the employment terms of a transferring workforce with those of the group company that it is joining. As this harmonisation is usually why commercial entities wish to change terms and conditions, the new proposal (as currently worded) will be of limited use.

### Redundancy payments

At present, if a TUPE transfer-related dismissal is made for an ETO reason, and the dismissal is otherwise fair, the employee will be treated as having been fairly dismissed for ‘some other substantial reason’. The new proposal is to treat some of these dismissals as redundancies, thereby entitling employees to redundancy payments.

### Employee liability information

Until now, TUPE has not compelled an outgoing employer to provide information to the incoming employer about the transferring staff and the liabilities and rights associated with them. It is now proposed that the outgoing employer must give the incoming employer what is called ‘employee liability information’. If it does not do so, it can be fined up to £75,000.

This information has to be in writing. It must identify (1) all the employees who are transferring, and (2) all the rights and obligations in relation to those employees insofar as they are (or ought to be) known to the outgoing employer at the time of the transfer. Any subsequent changes in the information must also be notified to the incoming employer. Moreover it is proposed that liability for failing to inform and consult affected staff now be shared between the transferor and the transferee rather than being the sole responsibility of the transferee.

### Insolvency

In line with its policy to promote an insolvency rescue culture, the government proposes to soften the effect of TUPE in cases such as administrations, company and individual voluntary arrangements and creditors’ voluntary windings up, where the underlying aim is to transfer a troubled business as a going concern.

The draft provisions propose two things:

- The first is to prevent the transfer to the incoming employer of some of the outgoing employer’s statutory debts to employees. These non-transferable debts include statutory insolvency scheme payments and statutory redundancy payments. It will be possible, however, to claim such payments from the Secretary of State.
- The second is to allow changes to the employment terms and conditions of relevant employees in cases where these changes are aimed at safeguarding employment opportunities by ensuring the survival of the organised grouping of workers involved.

The new provisions will not cover receiverships or members’ voluntary windings up.

### NHS retention of employment model

There is nothing in the new regulations to affect the current thinking in relation to the NHS retention of employment model in TUPE transfers.



Marc Meryon  
on 020 7614 3735  
or via e-mail  
m.meryon@kennedys-law.com  
or log on to  
[www.kennedys-law.com](http://www.kennedys-law.com)

# Pay protection for junior doctors

## The rebanding of medical posts has arguably generated more questions than answers.

**Safeguarding junior doctors against unexpected fluctuations in earnings is a noble principle. In practice, however, there are significant difficulties in applying it to long rotations, involving a series of posts or placements in a training programme. The identity of the posts – and their banding – may well not be clear at the outset, so it can be difficult to determine whether or not the earnings expectations of the doctor(s) involved are reasonable.**

In deciding if (and to what extent) pay protection applies, a key issue is identifying the moment at which a post has been ‘accepted’ by the doctor. Does there have to be a binding legal acceptance, where both parties have formally agreed all the details of the job, or will a simple acceptance in principle be enough? Following a recent Court of Appeal decision, the courts seem likely to take a commonsense approach when deciding on the meaning and timing of a doctor’s acceptance of a post, which then triggers pay protection.

A post will probably be treated as having been accepted once the doctor knows when and where they will take up that particular job, irrespective of whether the information is given by the employing health trust, the Deanery or the programme director. It is debatable, however, whether doctors on rotation accept all the posts on the rotation list from the outset, or, alternatively, only accept them as and when they are notified of each individual post during the course of the rotation. An NHS trust will improve its position in this regard by ensuring that all communications from it, the Deanery or the programme director state clearly when making job offers that the pay band for the relevant post(s) has not been determined for the period of the doctor’s occupancy of that particular job.

### Difficulties over rotation

The biggest problems are likely to be with posts in a long rotation that currently come within Band 2A of the New Deal for Junior Doctors but which, within five years, will drop back into Band 1A, with a significant reduction in the number of unsocial hours worked. In this context, the key underlying provisions are paragraphs 21(h) and (i) of the national terms and conditions of service (NTCS).

# Kennedys

Employment advice in black and white

## Employment Briefing

May 2005

Paragraph 21(h) deals with the (now, largely historical) question of pay protection for single posts on their transition to the New Deal. But it can be construed as saying that a person occupying a rebanded post is entitled to pay protection while they continue to do that particular job.

Paragraph 21(i) applies paragraph (h) to doctors on a rotation. Consequently, paragraph 21(h) will protect the pay for a particular rotational post if, before a doctor takes up the job:

- (1) it has been assessed for a New Deal-compliant pay band; and
- (2) the duties of the post have been changed before the doctor takes it up.



But for paragraph 21(i) to apply, the relevant post must have been assessed as New Deal compliant at the 'time of appointment' to the rotation. At present, however, it is unclear whether this means the actual beginning of the rotation, or the acceptance in principle of the series of posts or placements making up the rotation.

### Assessments

There are difficulties too about what is meant by a New Deal pay band assessment. On one view, there must be a link between the assessment and the change in duties; on another, if the assessment is made before the doctor accepts the post, then any subsequent changes in duties will also be pay protected. Arguably, paragraph 21(i) will only be triggered if a New Deal assessment of a post is carried out before the rotation begins, and that assessment changes the duties of the post after the rotation has begun but before the job is taken up by a particular doctor.

The wording of paragraph 21(i) appears to anticipate only one New Deal assessment in relation to each post on the rotation. Accordingly, it is questionable whether it affords pay protection following a second assessment that takes place between the doctor's joining the rotation and their taking up the rebanded post.

### Start of protection

For doctors who are not aware of the timing or location of a post at the outset of the rotation, pay protection may only bite when they accept that particular post. Inevitably, this will be at the lower band then applicable, and will reflect any subsequent rebanding between the doctor joining the rotation and their acceptance of the post.



Marc Meryon  
on 020 7614 3735  
or via e-mail  
m.meryon@kennedys-law.com  
or log on to  
www.kennedys-law.com

## Not taking the strain Employers may become more vulnerable to stress-related claims than previously.

**The Health and Safety Executive (HSE) defines 'stress' as being "the adverse reaction people have to excessive pressure or other types of demand placed upon them". And in the workplace it is a serious and expensive problem: the HSE estimates that work-related stress costs society about £3.7bn every year (and that is at 1995/1996 prices).**

### Present legal position

Recently, the law in this area seems to have moved in favour of employers. To ground a claim, employees must demonstrate to a very high degree that it was foreseeable that their employer's allegedly wrongful acts would have led to their present psychiatric injury. However, the HSE is seeking to develop an alternative approach to measuring stress, which may result in a lower threshold of liability.

At present, no common law stress claim arising out of overwork or lack of support will succeed unless there is psychiatric injury to the claimant which is attributable to work and was foreseeable.

Furthermore, unless it is aware of particular problems or vulnerabilities, an employer is entitled to assume that an employee is sufficiently robust to cope with the normal pressures of the job. Mere tearfulness or a degree of upset on the part of an employee will not be enough to justify the argument that the employer should have done something for its stricken member of staff. There must be evidence (visible to the employer) of a real prospect of psychiatric harm.

In addition, an employer:

- who offers confidential help to employees is unlikely to be in breach of duty;
- can only be expected to take steps which may do some good; and
- has no obligation to sack a stressed employee who wants to go on working; if there is no alternative solution, it is up to the employee to choose whether to stay or go.

### Avoiding claims

A number of steps should be taken to minimise both the risk of claims and the degree of possible liability.

These steps include:

- developing a protocol to deal with stress;
- informing all employees about stress;
- ensuring employees know about the potential problems of stress-related illness by posters and notices in the workplace, and then addressing the issue in individual performance reviews;
- imposing a contractual obligation on employees to notify their employer about their or colleagues' particular problems or vulnerabilities;
- reviewing recruitment procedures to identify problem employees;
- better monitoring of sickness absence;
- introducing regular audits of workplace stress;
- conducting general risk assessments in relation to working practices;
- keeping records of decisions made in relation to particular employees;
- introducing a confidential counselling/advisory service;

- when dealing with employees suffering from stress, obtaining medical evidence from occupational health professionals and considering all options short of dismissal or demotion, including a sabbatical, reduced duties, increased support and altered hours; and
- devising procedures to deal with specific incidents of harassment/bullying which may cause a stress-related illness, including the offer of immediate counselling and follow-up checks.

### The HSE's approach

For the first time, the HSE is now devising a benchmark of organisational behaviour so that

organisations can "measure their progress in tackling work-related stress and target action where it is most needed". However, from the employers' point of view, a major difficulty with this project is that progress towards achieving the requisite management standards is measured by reference to the satisfaction, or lack of it, among their employees.

The pilot scheme identifies leading causes of stress as being:

- the demands placed on employees;
- the control employees have over their work; and
- the amount of support an employee receives.

The benchmark for organisational behaviour will only be achieved if at least 85% of employees indicate they are satisfied with the way these particular work activities are managed.

The other causes of stress identified include:

- the employee's relationships at work;
- the employee's role at work; and
- the manner in which change is managed.

Particular emphasis is placed on the degree of support provided by employers to their staff and on systems being devised to enable employees to raise concerns.

As noted earlier, an employer who offers confidential help to employees, concerned that they may be suffering harmful levels of stress, is unlikely to be found in breach of duty. However, this legal standard may ultimately be replaced by a higher duty, requiring support to be provided to employees across the workforce well in advance of any harmful stress actually arising. At the very least, it is likely that the relevant HSE guidance will be used in evidence to help decide whether, in relation to a specific employee, stress-induced psychiatric injury was foreseeable and caused by the employer's breach of duty.



Brian Gegg  
on 020 7614 3736  
or via e-mail  
b.gegg@kennedys-law.com  
or log on to  
www.kennedys-law.com

## New TUPE regulations Revised transfer of undertaking rules should be in place by the autumn.

**Following an 18-month review of the issues underpinning the reform of the Transfer of Undertakings (Protection of Employment) Regulations 1981 (TUPE), the government has issued a new consultation document (www.dti.gov.uk/er) seeking views on whether the new draft regulations properly implement the policy decisions announced back in February 2003. The consultation period closes on 7 June and the current plan is that the revised TUPE rules will come into effect on 1 October 2005.**

For many years, public sector employers such as the NHS have been concerned about the uncertainties over the application of TUPE to outsourcing arrangements. So, under the Cabinet Office's 'Staff Transfers in the Public Sector 2000' statement of practice, the relevant parties now agree that TUPE will apply when functions are outsourced by public sector employers to private contractors and again when the service is either taken back in-house or transferred to another contractor. While this convention may well continue in future, NHS service contracts and working practices will have to be reviewed carefully in the light of the new regulations.

The main changes proposed in the draft revised TUPE rules are summarised below.

### Service provision changes

A new test will apply to service provision changes (ie outsourcing and similar exercises involving business services). The intention is to create a level playing field in which TUPE covers almost all service provision changes in cases where the service activities are carried out by the incoming contractor. The move is designed to reduce the current uncertainty about the application of TUPE in such cases and to bring public and private sector practices into line with one another.

Broadly speaking – and with certain exceptions – service provision changes will be treated as covered by TUPE if, before the change, employees are assigned to what is described as an 'organised grouping', whose purpose is to carry out the service activities on behalf of the client concerned. The exact scope of the term 'organised grouping' is likely to prove a fertile ground for dispute in future.