

TUPE



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Introduction

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) and previous versions of the regulations (which have been in force in the UK since 1981) implement the European Acquired Rights Directive, the general purpose of which is to safeguard employee rights in the transfer of a business.

This inbrief summarises the main aspects of TUPE, how and when it applies and includes the changes to TUPE which were implemented in January 2014.

Recent developments

In January 2014, the following changes to TUPE came into effect: narrowing the application of TUPE in the context of dismissals and changing terms and conditions of employment; permitting a change of location post-transfer to be an ETO reason; extending the period for providing employee liability information from 14 to 28 days; and providing for the transferee to be able to start collective redundancy consultation pre-transfer in certain circumstances.

It is not currently known whether TUPE will be amended or repealed following Brexit. In that context, while negotiating an outsourcing contract that will run for a number of years, the parties may want to assume that TUPE could look different, or not exist at all, meaning that automatic transfer may not occur at the end of the contract.

What is TUPE?

The purpose of TUPE is to protect employees' rights when the business in which they work changes hands. Its general thrust is to switch staff and liabilities from the transferor (the employees' employer before the transfer) to the transferee (the entity that acquires the business or takes over providing services). In outline, if TUPE applies:

- staff employed in the undertaking or assigned to the grouping providing the services transfer automatically to the transferee on their existing contracts and their continuous service with the transferor is preserved
- liabilities in respect of staff transferring (e.g. for unpaid wages or claims such as for injuries or harassment) pass over to the transferee
- dismissals because of a transfer are unfair unless they are justified by an economic, technical or organisation reason entailing a change in the workforce (an 'ETO reason'). The transferee is liable even if the transferor carries out the dismissal
- the transferor (and, in some cases, the transferee) has a duty to give information to elected staff representatives and must normally consult over the implications of the

transfer

- the transferor is required to give the transferee information about the staff transferring, their contracts of employment and any associated liabilities

When does TUPE apply?

TUPE applies to any:

- transfer from one employer to another of an economic entity (an organised grouping of resources which has the objective of pursuing an economic activity)
- service provision change, when there is an organised grouping of employees whose principal purpose is carrying out activities which are switching from one employer to another

A transfer of an economic entity occurs most clearly when there is a sale of business, which typically comprises assets such as premises, equipment, customers, staff and goodwill. In determining whether TUPE applies, it is necessary to identify the operation and what it comprises and then to consider whether it has transferred with its identity retained. In general, if the activities are the same, the customers are the same and staff are still required (even if not the same staff) that will often be enough for there to be retention of identity. However, all relevant factors will be taken into consideration when assessing each case and the weight given to different factors will depend on the nature of that particular business.

In practice, a service provision change is more common and easier to identify. A service provision change occurs when: (a) a service is contracted out from a client to a contractor for the first time (outsourcing); (b) a service is moved from one contractor to a new contractor; (second generation outsourcing) or (c) the service is brought back 'in house' by the client. After identifying the service and whether it is actually transferring, it is then necessary to identify the organised grouping of employees (which must be situated in Britain), identify its principal purpose, consider whether that organised grouping provides the whole of the service, and whether the services being performed by the organised grouping are transferring in their entirety. After that it is necessary to identify which employees are

permanently assigned to the organised grouping and whether they will transfer.

A 'one-off' buying-in of services from a contractor 'of short-term duration' will not normally be covered. For example the hiring of security staff to protect athletes during a major sporting tournament would be a short-term buying-in of services and so excluded from TUPE, whereas a contract for the provision of security advice to the event organisers over a period of several years would potentially be covered.

In addition, activities mainly related to the supply of goods rather than services will not normally be covered. Examples are a contract where a business purchases components for machinery it is producing or buys sandwiches for re-sale in its canteen.

Who and what transfers?

TUPE applies only to employees who are permanently assigned to the relevant undertaking or organised grouping of employees - this is not a simple percentage utilisation test. The question of whether an employee is 'assigned' will depend on the particular facts including, for example, whether the employee was intentionally or formally allocated to the grouping (for example in the job description), how the costs of employment are allocated, whether the employee could work or does work on other activities in practice (and the importance of such activities), physical proximity to other employees in the grouping, whether the employee is permanently or temporarily allocated to the grouping, and other evidence of organisation into that grouping such as team lists, email groups, meeting attendances, etc.

Changing terms and conditions

TUPE restricts the ability of employers to change employees' terms and conditions in the context of a transfer, even where the employees consent to the variation. The basic rule is that no variation of any contractual term is permitted where the reason is the transfer. However the variation is permitted if:

- made for an ETO reason and agreed by both employer and employee
- the contract expressly permits the change

- the change is entirely unconnected with the transfer

TUPE does not prevent changes to terms incorporated from collective agreements if the change is made more than one year after the transfer and the changes leave the employee in no worse position overall.

Notwithstanding these exceptions it is still necessary to consider whether the variation to any contractual terms would be effective anyway under normal legal principles (which will usually require employee consent).

Variations made with the intention of harmonising terms and conditions will normally be viewed as "by reason of the transfer" and therefore void. The employer must be able to point to some extenuating circumstances to distance its reasons as far as possible from the transfer.

The ETO exemption is rarely helpful in the context of contractual variations given the need for the employer's reason to "entail changes in the workforce". This requires the existence of a clear link between the contractual variations and other changes to the numbers, functions or workplace locations of the affected employees.

An economic reason may be a reason relating to the profitability or market performance of the new employer's business. A technical reason may relate to the nature of the equipment or production processes operated by the new employer. An organisational reason may relate to the management or organisation or structure of the new employer's business.

In many cases employers will be unable to make legally binding changes to terms and conditions following on from a TUPE transfer — even if employees would agree to the changes, although in practice changes which benefit the employee or which are broadly neutral are unlikely to be challenged.

Dismissals because of a transfer

Where the sole or principal reason for an employee's dismissal is the transfer, TUPE deems the dismissal to be automatically unfair. An employee is still required to have the necessary qualifying service to bring such a claim and the normal compensatory award limits still apply.

A dismissal occurring in the context of a transfer will not be automatically unfair when:

- the reason for it is entirely unconnected with the transfer (eg misconduct); or
- the sole or principal reason for it is an ETO reason entailing changes in the workforce (e.g. redundancy caused by a change of workplace location)

However, even when the dismissal is not automatically unfair, it may still be unfair if the employer does not have a good reason and does not follow a fair process.

Information about employees and liabilities

TUPE requires transferors to give transferees employee liability information. This is information on:

- the identity and age of the employees within the scope of the transfer
- the statutory 'statement of employment particulars' (i.e. all the information an employer is obliged to give an employee in a statement of terms and conditions of employment)
- any relevant collective agreement
- any disciplinary action or grievances instigated within the preceding two years
- any legal proceedings brought by the relevant employees against the transferor in the preceding two years
- any legal claim which the transferor has reasonable grounds to believe an employee may bring

Although this does not require a transferor to provide as much information as would be normal on a 'due diligence' exercise before a transfer, it goes a long way to requiring disclosure of the most important information. Transferors will be required not only to identify who will transfer, but also many of their contractual terms.

The transferor must supply employee liability information at least four weeks before completion of the transfer, unless there are "special circumstances" which make it not reasonably practicable to provide it in this time frame (a very limited exception in practice). It

can be given in instalments and must be updated if there are changes.

If a transferor fails to comply with the rules on providing employee liability information, an Employment Tribunal may order it to pay the transferee compensation. In deciding how much compensation to award, a tribunal will take into account various factors including any loss sustained by the transferee. The award must be a minimum of £500 per employee, unless the Tribunal considers it just and equitable to award less than this.

Obligations to inform and consult

TUPE requires the transferor to inform and (if appropriate) consult 'appropriate representatives' of employees who are affected by a transfer. These are either recognised trade union or elected employee representatives.

The transferor must supply the following information:

- the fact that the transfer is to take place, when it will occur and the reasons for it
- the implications of the transfer for the affected employees
- any 'measures' (i.e. material changes) that it is envisaged will be taken in connection with the transfer in relation to the affected employees. This might include any unavoidable changes to incentive arrangements, payroll date or benefit providers, consequential redundancies, a change to the workplace location, participation in a different pension scheme, the fact that the transferee's policies will apply in future, etc
- information relating to the transferor's use of agency workers

When there are measures envisaged in

connection with the transfer, the employer must consult appropriate representatives of affected employees with a view to seeking their agreement to them. NB: employers with fewer than 10 employees may consult them directly.

It should be noted that 'affected employees' are any employees - of either of the parties to the transfer - who may be affected by the transfer or measures taken in connection with it. This may include staff who do not transfer. Importantly, the transferee must supply to the transferor information about any measures it is proposing to take post transfer, long enough before the transfer to enable effective consultation with representatives to take place.

Where a transferor or transferee fails to comply with the rules on information and consultation, a tribunal can order a penalty of up to 25% of the annual payroll costs of employees affected by the transfer (i.e. 13 weeks pay per affected employee).

Claims may be brought against either or both of the transferor and the transferee for failure to inform and consult and they will be jointly as well as individually liable to pay any penalty incurred, whichever party was at fault. (In practice, it is likely that a claim will be made against the person with the deepest pocket).

Provided the transferor agrees, the transferee may begin collective redundancy consultation with transferring staff even before the transfer. However, TUPE stops short of allowing the transferee to actually give notices of termination before the transfer nor does it sanction the transferor doing this on the transferee's behalf.

Transfer of insolvent businesses

The Government is committed to promoting a 'rescue culture' for businesses that are or are likely to become insolvent. Consistent with this,

TUPE contains two specific measures, known as 'the rescue provisions', to encourage the sale of insolvent businesses as going concerns:

- certain of the transferor's debts will not transfer to the transferee
- transferors or transferees and employee representatives - including union representatives, if a union is recognised - may agree changes to terms of employment (which would otherwise be void under normal TUPE rules) if agreed with a view to safeguarding employment opportunities by ensuring the survival of the business ('permitted variations')

These provisions will only apply if insolvency proceedings were entered into under the supervision of an insolvency practitioner and with a view to survival of the business or part of it, as opposed to liquidation of assets. If the insolvency was instituted with a view to liquidation, then the provisions of TUPE which provide for automatic transfer of employees on existing contracts and automatic unfair dismissal for transfer-related dismissals do not apply. However, a transferee who employs the employees of a business it has bought out of insolvency may find that those employees still have continuity of service (and thus unfair dismissal rights) preserved under the Employment Rights Act 1996.

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