

M&A employment law support: TUPE clauses in a business transfer agreement



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If the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) apply to a business sale, it has significant ramifications for both the buyer and seller. This Inbrief examines how the business transfer agreement can best cater for these issues.

Buying a business – what if TUPE applies?

On a business sale, if the assets sold amount to “an economic entity which retains its identity”, TUPE will apply. As we have discussed previously in our M&A employment law support series, the main ramifications of TUPE applying are:

- ▶ there is a prescriptive information and consultation process which must be carried out before completion, failing which both seller and buyer may face legal claims; and
- ▶ employees who are assigned to the business will automatically transfer on their existing terms and conditions, meaning rights and liabilities also transfer to the buyer.

It is unsurprising, then, that a significant amount of time is devoted to the TUPE provisions in any business transfer agreement (BTA), to ensure that the correct process is followed, liabilities are apportioned appropriately and both parties have reasonable and reciprocal protection against any claims.

Information and consultation – the potential pitfalls

At the outset, it is worth noting that failure to inform and consult under TUPE can be a joint and several liability between the seller and the buyer. This means that when it comes to holding the parties liable for getting it wrong, an employment tribunal could either divide liability between the parties, or it could hold both parties collectively and individually liable for the whole amount of compensation.

How might they get it wrong? Here are some of the key areas.

Understanding who is “affected”

Informing and consulting under TUPE must be done with employee representatives of any affected employees. This may involve an election of representatives, or it may be with trade union representatives. Note that for transfers which will take place after 1 July 2024, employers may consult with affected employees directly (provided there are no existing employee representatives in place) where either the business employs fewer than 50 employees or the proposed transfer involves fewer than 10 transferring employees (or both).

Sellers do not always realise that “affected” employees are not just those whose employment will transfer to the buyer. It has a wider meaning than that and includes anyone whose employment is in some way impacted by the transfer of the business. For example, it could include employees whose employment does not actually transfer, because they are not legally “assigned” to the organised group of employees, but whose roles will change because part of their work currently relates to the business that is being sold. Shared function roles such as a head of HR, or a head of finance, for example, may fall into this category. If a seller fails to include them in the TUPE information and consultation process, they may have a legal claim. The same applies to the buyer, who may have an obligation to consult its own employees if the arrival of the transferring employees will have an impact on its existing workforce.

Ticking all the information boxes

Information to be given to representatives includes: when and why a transfer is taking place; the legal, economic and social implications of the transfer; any measures that the target or the buyer proposes in



connection with the transfer; and information related to agency workers.

The information about agency workers is often overlooked, as it is somewhat incongruous in this context. A seller may not realise that even if it does not engage agency workers, it needs to specify that none are engaged.

There is no requirement for the TUPE information to be given all at once, meaning it can be “drip fed” as and when known. The challenge with drip feeding, though, is that a buyer may forget to pass the measures information onto the seller, and/or the seller may forget to pass it onto the employee representatives. An Employment Appeal Tribunal [decision](#) emphasised the importance of the seller passing on all information required by TUPE, even if it feels fairly minor in the grand scheme of things.

Are there really “no measures”?

Where there are proposed measures, the employer must consult with representatives with a view to reaching agreement with them. “Measures” has been interpreted broadly as any “action, step or arrangement” taken in connection with the transfer and could include dismissals, reporting line changes, changes to benefit providers, and changes to pay day, to name a few.

It is sometimes thought that this term only catches changes to terms and conditions, but this is incorrect. It is in fact only the most minor administrative matter which would not be classed as a “measure”. A seller should therefore be wary of a buyer who says there are no measures envisaged.

Has full employee liability information been provided?

Whether a buyer accurately identifies all of the measures it envisages is also partly dependent on the seller giving it accurate employee liability information

at the outset of the process. The scope of employee liability information is fairly extensive, including the particulars of employment that must be given to an employee under section 1 of the Employment Rights Act 1996. Done correctly, it ought to provide quite a full picture. That said, there is always the risk of human error, particularly where the parties are working at pace, so care should be taken to ensure that full and accurate information is provided (not least because the buyer will have a legal claim against the seller if this obligation is not fulfilled properly).

Consulting ‘in good time’

The consultation process must take place “in good time” before the TUPE transfer. This is not an overly prescriptive requirement in the UK as no minimum timeframe is stated. In other jurisdictions, where there are strict timeframes, it may be easier to point towards a breach. Nevertheless, a hasty consultation process could be open to challenge on the basis that consultation could not have been meaningful.

What about collaboration?

TUPE does not expressly provide for collaboration between the seller and the buyer when it comes to liaising with employees or employee representatives. The seller provides the buyer with employee liability information, and the buyer provides the seller with measures. The task of imparting the information to employees who are due to transfer is then solely down to the seller as far as TUPE is concerned (as the parties are only ever required to consult their own employees under TUPE). In practice, though, it is often beneficial to all parties for the buyer to join the seller in at least some of the consultation meetings with employee representatives. That way, transferring

employees can ask the buyer questions about their future employment (which is what they generally care most about), and the buyer can present a positive picture to secure employee buy-in early on.

Transfer of liabilities

To summarise the impact of TUPE for an M&A scenario, TUPE seeks to protect employees by providing that:

- ▶ all of the seller’s rights, powers, duties and liabilities under or in connection with the transferring employee’s employment contract, are transferred to the buyer; and
- ▶ any act or omission before completion, of (or in relation to) the seller in respect of that employment contract, shall be deemed as an act or omission of (or in relation to) the buyer.

This means that employees’ contractual entitlements such as salary, holiday and notice will transfer, and the buyer will be obliged to honour these. It also means that any potential liability for a previous failure on the seller’s part to honour employees’ contractual terms, or to meet the requirements of any statutory employment laws (which are implied into any employment contract), will also transfer to the buyer.

Examples of liabilities which a buyer could inherit on completion might include the following:

- ▶ **Claims for sexual harassment** - even though the buyer committed no wrongdoing and even where the perpetrator has not transferred to the buyer.
- ▶ **Claims for unfair dismissal** - in addition to claims relating to contested performance or misconduct exits, such claims could arise from allegations that the sole or principal reason for the



dismissal is the TUPE transfer, which is prohibited by TUPE.

- ▶ **Claims for underpayment of holiday pay** - calculating holiday pay correctly is notoriously difficult and complex [EU rules on holiday pay have been kept following Brexit](#).
- ▶ **Claims for failure to make reasonable adjustments in relation to a transferring employee's disability** - this risk could arise even though the buyer has only just become the employer.
- ▶ **Claims from unexpected employees that they have transferred under TUPE** - these are employees who the parties did not deem to be assigned, whether by oversight or reasoned analysis, but who contest that assessment and assert they have transferred (TUPE does not define the word "assigned" so the parties must rely on case law as much as possible). These are often called "woodwork" employees.
- ▶ **Certain rights for enhanced redundancy payments or early retirement benefits under a defined benefit occupational pension scheme** - commonly known as "Beckmann rights" after the court case which dealt with them, these are the exception to the general rule that occupational pension scheme terms won't TUPE transfer.

Any of these potential claims present the risk of damages/compensation being awarded against the buyer, in addition to the legal costs arising from defending or settling such claims (not to mention reputational damage caused by litigation in a public forum).

Addressing practicalities in the business transfer agreement

Given the various liabilities lurking within a TUPE scenario, it is vital for

the BTA to include sensible provisions which accommodate the nuances of the TUPE process.

- ▶ **Information and consultation** - it is often helpful to have a clause in the BTA under which the seller and buyer agree to cooperate with regards to information and consultation. For example, this might specify a minimum number of meetings which the buyer will be entitled to attend.
- ▶ **Employee liability information** - it is also possible to set out a list of employee information which the seller must provide to the buyer. This ensures that the seller knows what they must provide, and that the buyer has a contractual remedy should they fail to provide it. Sometimes a buyer may want information that is not covered by the employee liability information requirement under TUPE – such as copies of the actual contracts and payroll information – to speed up the onboarding process post completion. This can be catered for, although there may be a requirement to provide the extra information in anonymised form.
- ▶ **The timetable** - timings can also be established in the BTA, for example, a requirement to provide the employee information by a certain date (even if that is earlier than TUPE would demand).
- ▶ **Split sign and completion** - this can help with the practical issue of needing to inform and consult before the business is sold. This means that employees can be told of the upcoming sale after sign (once it is announced and is no longer confidential) and then the TUPE process can follow in the run-up to completion.
- ▶ **List of transferring employees** - it's helpful to have a scheduled list of names of employees who will

transfer, so that the parties' expectations are clear. This will also mean that any claim brought under the woodwork employee indemnity will be more straightforward.

- ▶ **No reassignment** - capturing a list of transferring employees can be combined with clauses which require the seller to obtain the buyer's permission before reassigning employees away from the business (such that they *would not* TUPE transfer – a trick to keep the good ones); or assigning different employees into the business (such that they *would* TUPE transfer – a trick to get rid of the bad ones). These will usually sit alongside the other restrictions relating to the conduct of the business between signing and completion.
- ▶ **No encouraging of objections** - in addition, the seller can be contractually prohibited from encouraging an employee to object to the TUPE transfer as a way to avoid their employment transferring to the buyer.

TUPE indemnities

In addition to clauses dealing with the practical impact of TUPE, it is also generally in the interests of both the seller and the buyer to have a robust set of TUPE indemnities, enabling liability to be apportioned in an appropriate way.

The general principle when drafting indemnities is that whatever happens on one party's watch, should be their cost. This means that indemnities typically assign liability for pre-completion matters to the seller, and for post-completion matters to the buyer. Care is needed to ensure that the indemnities cover all losses needed – such as damages, tax/penalties, legal costs and so on.



In this way, if a buyer inherited a tribunal claim under TUPE which related to the period before the transfer and should therefore be the responsibility of the seller, the buyer could recoup their losses under the indemnity in defending (and potentially settling) the claim and/or a finding against them.

There are, however, some nuances to this:

- ▶ If the buyer, pre-completion, proposes a substantial change in the working conditions to the material detriment of the transferring employees and they resign, through no fault of the seller, this could lead to a claim against the seller. The seller will therefore want to ensure any such claims are carved out from the indemnity which it provides to the buyer for the pre-completion period and that liability for such claims sits instead with the buyer (as it was of course the buyer's proposed change that led to the problem).
- ▶ Where the seller has failed to inform and consult properly, the buyer can inherit this liability. The buyer will therefore want to ensure it is sufficiently indemnified for the seller's failure. However, if the seller failed to satisfy these obligations because the buyer did not provide it with measures information (or provided it with inaccurate measures information), the seller will not wish to bear that cost.
- ▶ An indemnity covering woodwork employees is desirable for the buyer, so that if it faces claims that unexpected employees have transferred and/or if it purports to

dismiss such employees, its costs are covered by the seller (including any employment costs to the point of dismissal).

Generally, the parties will want to impose conditions on the indemnity. For example:

- ▶ An obligation to notify the other party of the issue covered by the indemnity within a short window of becoming aware of it.
- ▶ To reduce the seller's ongoing employment costs under the indemnity, a requirement that the buyer dismisses / purports to dismiss woodwork employees within a limited number of weeks.
- ▶ To mitigate costs arising from woodwork employees, a seller may also want the buyer to be required to offer these individuals any available and suitable role which the buyer may have in its own group.

This is a complicated area. Please get in touch with your usual Lewis Silkin contact if you need any support in drafting or reviewing TUPE provisions under any purchase documentation governing the acquisition.

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