

An Employers' Guide to TUPE

This factsheet sets out a guide to the Transfer of Undertakings (Protection of Employment) Regulations 2006 (commonly known as TUPE), when they may apply and the implications for employers if they do.

What is TUPE?

TUPE are the regulations that apply to protect employees' rights when their employment, is transferred to a new employer in certain circumstances (see "When does TUPE apply").

TUPE will not apply in a share sale, as the identity of the entity has remained the same.

When does TUPE apply?

TUPE will apply when there has been a relevant transfer. There are two types of relevant transfers:

1. The transfer of a business

A 'business transfer' is the transfer of a business or undertaking or part of a business or undertaking where there is a transfer of an economic entity that retains its identity.

How the transfer takes place is not relevant – indeed it can result from a single transaction or a series of transactions.

The test as to whether the economic entity has retained its identity is whether the business operation is continuing. For example, if a pub is purchased and continues to be run as a pub by the new owner, this will be a transfer of an economic entity and therefore TUPE will apply. This is even if the new owner makes a few changes to the way the pub is run after purchase.

2. A service provision change

A 'service provision change' is where an employer decides to either:

- Outsource work by using a contractor;
- Bring a previously outsourced service in-house; or
- Reassign an outsourced contract to another provider.

The employees transferring will be those who can be identified as being in an 'organised grouping' and whose principal purpose is to carry out the transferring activities on behalf of the client. This 'organised grouping' can be as small as a single employee.

Unlike with a business transfer, there is no need for the entity to retain its identity;

it is merely necessary for one person to cease to provide the activities and for another to take them over.

TUPE will not apply to contracts for services for a single specific event or a task of short term duration. Nor does it cover the supply of goods for the clients use.

TUPE operates as a matter of law, meaning that whilst it is open for the transferring employer and incoming employer (“transferee”) to seek agreement as to whether TUPE will apply to the transaction, such an agreement cannot disapply the TUPE provisions, and the affected employees may well seek to establish the opposite.

If TUPE applies, what impact/effect will it have?

If TUPE applies the incoming employer should be aware that:

- Any employees of the employer (“transferor”) assigned to the ‘organised grouping’ immediately before the transfer will automatically become employees of the incoming employer;
- Any dismissals where the principal reason is the transfer will be automatically unfair. This will include any resignation in response to a repudiatory breach of contract or to substantial and detrimental changes to the employees working conditions;
- Any employees dismissed before the transfer, but by reason of the transfer, will also automatically transfer;
- All existing terms of employment (with the exception of pensions) for the affected employees will be preserved and there will be no break in the period of continuous employment;
- All rights, powers, duties and liabilities under the employment contracts pass to the incoming employer;
- Any changes to contractual terms made by the incoming employer will be void if the principal reason for the change is the transfer. Changes may possibly be permissible however, if there is an existing contractual right to vary; and
- If employees object to the transfer, i.e. refuse to transfer, their employment will terminate with no right to compensation.

In order to ensure that the new employer is aware of all of the above, and that any transferring employer will not have any unknown continuing liabilities, there is an “informing and consultation” process that is followed to ensure all legal obligations for both sides are complied with.

Do be aware that some of the above protections are relaxed in the event the transferor is insolvent.

Practical considerations if TUPE applies

If it is deemed TUPE applies, the following process can generally be applied:

Stage 1

Considerations for the transferor

At the time of agreeing the sale of a business, or an out/insourcing exercise, the transferor will need to identify who the affected employees are, and inform them of the

transfer. “Affected employees” can include transferring employees and any employees who are to remain with the transferee after the transfer – advice should be taken if there is any uncertainty as to who is an “affected employees”. If there are any proposed changes to their employment (known as ‘measures’) the transferor will also need to commence a period of consultation.

If the group of affected employees will be 10 or more the transferor will need to consult an elected representative of the group or a recognised trade union representative. In the event that there are no group representatives in place already, it will be necessary to run a workplace election exercise. Time should be factored in for this exercise to be legally compliant.

If less than 10 employees are transferring, the employer can consult with the individual employees directly.

Failure to comply with the obligation to inform and, where applicable, consult affected employees could result in each employee being awarded 13 weeks actual salary in compensation. This liability will remain with the transferor!

Considerations for the transferee

The transferee should consider any business plan prepared in connection with the transfer and look at the following generally:

- If there is already a team in place in their current business structure, is there sufficient work for the transferring employees?
- From a commercial perspective, how will the business keep staff motivated during the transfer?
- If there are any certain changes e.g. location or reduction in staff, will a consultation process need to be run alongside any TUPE consultation?
- Identify if any “measures” are to be taken after the transfer.

Stage 2

Preparing for the transfer - transferee

The transferee must provide the transferor certain information in connection with the transferring employees – this is known as the employee liability information (or “ELI” for short). The ELI must be provided in a GDPR compliant manner at least 28 days in advance of the transfer or, if there will not be a period of 28 days available, as soon as reasonably practical. ELI includes the transferring employees:

- age and identity;
- employment contracts and roles;
- personnel records - including their grievance and disciplinary history;
- collective agreements; and
- details of employment claims against the transferor.

The transferor may wish to invite the transferee (or its management representatives) to meet with the affected employees and to answer any questions they may have. These meetings can be (although don’t have to be) held at any new location or site where they will be working after the transfer as this can alleviate concerns and allow employees who will be unable to manage the commute or change of location to bring this to the employer’s attention if appropriate.

Preparing for the transfer - transferee

The transferee will need to firstly request and secondly, review the ELI. This is important for the following reasons:

1. They will need to plan for financial outgoings,
2. Staffing arrangements will need to be considered, including but not limited to, whether there will be any potential redundancies, adjustments to the working environment, and inductions for the new staff; and
3. They will need to consider whether any changes to terms and conditions will be required in the form for measures.

It is at this point in the process that it is usual to write to the transferee and inform them of whether there will be any “measures”. The issue of appropriate indemnities and/or warranties to be included in the asset purchase agreement is often also triggered by the ELI review.

Stage 3

Actions at the point of transfer and after the transfer - transferee

If some employees of the transferee are not transferring (for example, part of the transferee’s business is continuing) the transferor should ensure that any reorganisation and/or reallocation of their duties following the transfer are correctly and fairly implemented.

P45s may have to be issued to the transferred employees.

Actions at the point of transfer and after the transfer - transferee

The date the transfer is due to take place should be clearly communicated.

It is good practice for the transferee to conduct a welcome and induction session with all new employees in the first few days following the transfer to settle matters.

The transferor should be sure to:

- Consider any feedback from new and existing employers to help identify any issues or areas where further information may be required;
- Send either a letter, or if preferred, an amended employment particulars to new employees confirming the change of employer name and address; and
- Ensure reasonable temporary allowances are made for new employees whilst they are provided with training.

Legal Assistance

Here, at Wilson Browne Solicitors, the employment team advise in relation to all aspects of employment law pertaining to the buying and selling of businesses, and in connection with in/outsourcing activities.

Recent case law

In February 2021, the Employment Appeal Tribunal (EAT) in the case of *McTear Contracts Ltd v Bennett* determined that where a service provision change under the TUPE regulations involves multiple transferees, the employee's contract of employment can be split between several employers, meaning the employee's duties will be divided between them.

The EAT judge found there was no reason in principle why an employee may not, following a service provision change, hold two or more contracts of employment with different employers at the same time, provided that the work attributable to each contract was clearly separate from the work on the other(s) and was identifiable as such.

What does this mean for employers?

For now, the case has been remitted back to the original tribunal but the EAT's decision is significant because the previous position in UK case law did not support the separation of an employment contract across more than one transferee.

The EAT's decision suggests that an alternative approach must be taken which includes the possibility of allocating liability across all of the transferees.

Understandably, this creates an additional degree of uncertainty for employers so if you are faced with this situation, we highly recommend seeking legal advice that is unique to your circumstances.

If you need any assistance or advice please contact our Employment Team.

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