

TUPE

When does TUPE Apply

1. When a business or part of a business is transferred to a new employer or;
2. When a service provision change (SPC) takes place e.g. outsourcing, insourcing or where a contractor takes on a contract to provide a service for a client from another contractor.

The two categories are not mutually exclusive and some transfers will qualify both as a business transfer and a service provision change for example the outsourcing of a service.

Business Transfers

To qualify as a business transfer the identity of the employer must change. Therefore the regulations do not apply to changes of share ownership as the same company continues to be the employer.

In the case of business transfers (but not SPC) there must be the transfer of “an economic entity which retains its identity.” An economic entity means “an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.” The reference to pursuing an economic activity does not mean that charities are not covered and charitable organisations are covered by the TUPE Regulations in precisely the same way as commercial organisations.

Service Provision Changes

The regulations apply if there is “an organised grouping of employees which has as its principal purpose the carrying out of the activities concerned on behalf of the client.” TUPE will not apply to an SPC in the following circumstances:-

1. While the contractor changes the client must remain the same. If the services are not being performed for the same client, TUPE will not apply. In a voluntary sector context this generally means that the commissioner or funder of the services remains the same.
2. The activities being performed before and after the change must be fundamentally the same as the activities carried out before the change.
3. There may be cases where services are so split up or “fragmented” that the activities are not fundamentally the same and TUPE will not apply.
4. Immediately before the SPC there must be “an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client.” Therefore TUPE is excluded where there was no identifiable grouping of employees or where it just happens that in practice a

group of employees worked mostly for a particular client rather than having being put together for that purpose. An organised grouping of employees can constitute just one member of staff.

5. TUPE will not apply if the client intends the activities to be carried out in connection with a single specific event or task of short term duration (the activities must be both for a specific event and of short-term duration) and TUPE does not apply to the supply of goods. The BIS Guidance gives the example of a client engaging a contractor to supply sandwiches and drinks to its canteen for the client to sell to its own staff. TUPE would not apply in those circumstances but might apply if the contract was for the contractor to run the client's staff canteen.

2014 Changes

The TUPE Regulations were amended by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014 which came into force on 31 January 2014. The main changes are as follows:-

1. A clarification that the test for service provision changes is that the activities carried out after the change in provider must be fundamentally the same as those previously carried out. This merely reflects established case law.
2. Amendments to the provisions which give protection against dismissal and changes to employment contracts. These protections will apply where the sole or principal reason for the dismissal or variation is the transfer (unless the sole or principal reason for the dismissal or variation is an economic, technical or organisational reason entailing changes in the workforce (ETO reason)). Previously dismissals and contractual variations were also automatically unfair if they were "connected" to the transfer.
3. A change to the place where employees are employed post transfer can be an ETO reason.
4. Changes to employment contracts incorporated from collective agreements will be permitted when more than a year has passed since the transfer provided that overall the contract is no less favourable to the employee.
5. A provision allowing micro-businesses (those employing fewer than 10 staff) to inform and consult employees directly where there are no existing staff representatives. Effective from 31 July.
6. The deadline for provision of Employee Liability Information is extended from 14 to 28 days before transfer.
7. An amendment to the collective redundancy regulations so that a transferee may elect to consult representatives of transferring staff about proposed collective redundancies (20 or more within 90 days) prior to the transfer so long as the transferor agrees to such a consultation.

Employment Implications of TUPE

1. All employees employed by the transferor immediately before the transfer are automatically transferred to employment with the transferee on their existing terms and conditions.
2. The obligations assumed by the transferee as a result of TUPE are all encompassing with one major exception and that is occupational pensions. Incoming employers do not have to contribute to occupational schemes but must provide a reasonable alternative and match an employee's contributions to a stakeholder scheme up to 6% as a minimum.
3. In all other respects however the transferee assumes the liabilities and obligations of the transferor including in particular:
 - (a) current terms and conditions of employment;
 - (b) continuity of service;
 - (c) the terms of any collective agreement which have been incorporated into the employment contract;
 - (d) where there was a recognition agreement the new employer will be required to recognise that union or unions only if the organised grouping of transferred employees maintains an identity distinct from the remainder of the new employer's business;
 - (e) redundancy payments both statutory and contractual;
 - (f) arrears of pay, holiday pay and sick pay and any accrued holiday entitlement which has not lapsed under the contract,
 - (g) liabilities accruing prior to the date of transfer under employment protection legislation including liability for unfair dismissal, discrimination and breach of contract;
 - (h) liabilities arising outside the contract of employment such as industrial injury (with a right to claim against the transferor's insurance);
 - (i) liability to meet any agreed pay increases;
 - (j) working time, minimum wage or similar claims.

Collective Agreements

Under the amendments made by the 2014 Regulations changes made post transfer are not binding on a transferee if the transferee is not a party to the later collective agreement.

Pension Rights following a TUPE Transfer

The only contractual right that does not transfer under TUPE is an employee's right to an occupational pension scheme. Benefits under the scheme relating to old age, invalidity or survivors benefits do not transfer. However rights relating to redundancy and early retirement benefits (common under occupational schemes) are not excluded.

Where the transferor offers an occupational scheme the new employer has to provide a reasonable alternative which, as a minimum, is access to a defined contribution or stakeholder scheme with matching contributions of up to 6% of the employee's basic pay.

Auto-enrolment

Auto-enrolment obligations were introduced in October 2012 and will apply to all employers from 1 February 2018. Automatic enrolment does not affect the TUPE rules but where a transferee is already subject to the duty to automatically enrol staff, they will have to automatically enrol all eligible transferring workers.

Varying Terms and Conditions

The starting point is that terms and conditions cannot be varied by transferor or transferee if the sole or principal reason for the variation is the transfer and any variation is void even if agreed. However there are a number of exceptions as follows:-

1. Where the reason for variation is unrelated to the transfer (subject to the normal rules concerning contractual variation)
2. Where there is an economic, technical or organisational reason (ETO reason) entailing changes in the workforce provided that the employer and employee agree the variation.
3. When the terms of the employment contract permit variation.
4. Under the 2014 changes if the contract incorporates terms and conditions from a collective agreement, those terms and conditions may be varied after more than a year from the transfer provided that, overall, the employee's contract is no less favourable than it was immediately before the variation. If this test is not satisfied, the purported variation will be void.
5. Changes that are favourable to the employee may be agreed.
6. In some insolvency situations.

Section 4(9) of the TUPE Regulations remains in force permitting an employee to treat the contract as terminated where a transfer involves a substantial change in working conditions to his/her material detriment.

Prior to 2014 any change connected to the transfer would also be void and notwithstanding this provision has been removed, it is not clear how the courts will distinguish variations by reason of the transfer from those that are connected to the transfer and therefore, potentially, enforceable. It will be sensible to adopt a cautious approach and avoid any change that is connected to the transfer pending further clarification.

Economic, Technical or Organisational Reason entailing changes in the Workforce

There are no statutory definitions of these terms but case law has established that "entailing changes in the workforce" means a change in the number or functions of staff i.e. redundancies or changes to job functions. The 2014 rules have added a change to the

place of work as an ETO reason and therefore not automatically unfair. Again the normal rules governing contractual variations will apply.

Dismissal

Neither the transferor nor the transferee can dismiss an employee if the sole or principal reason for the dismissal is the transfer and such dismissals will be automatically unfair. Again dismissals can only be justified for an ETO reason necessitating a change in the workforce. Under the 2014 changes dismissals “connected to” rather than “by reason of” may not be void but as above caution needs to be exercised pending guidelines as to when a dismissal will not be automatically unfair. Further it is established by case law that a transferor cannot rely on a transferee’s reason for dismissal. If a dismissal is not automatically unfair it may still be unfair under the “normal” unfair dismissal rules.

As above, transferred employees who find that there has been or will be a substantial change for the worse in their working conditions as a consequence of transfer have the right to terminate their contract and claim constructive dismissal before an Employment Tribunal on the grounds that the actions of the employer constitute a de facto termination of their contract. An employee who resigns in reliance on this right cannot make a claim for pay in lieu of their notice period.

TUPE and Redundancy

Under the 2014 rules if the collective redundancy provisions apply i.e. 20 or more employees are proposed as redundant within the next 90 days, the transferee may elect by written notice to consult (or start to consult) transferring staff prior to the transfer (“pre-transfer consultation”) if the transferee makes such an election, liability for any failure to comply with the collective redundancy rules lies with the transferee notwithstanding he is not the employer at the date of the election. The appropriate representatives for consultation purposes will be the transferor’s trade union representatives if there is a recognised union but otherwise may be employees of either the transferor or the transferee provided that they meet the statutory requirements for employee representatives. The transferee will need to ensure that the representatives are provided with access to the affected transferring staff and use of accommodation and other facilities at the transferor’s workplace to ensure compliance with statutory requirements. The rules for pre-transfer consultation will be the same as for normal collective redundancy consultation. Consultation under TUPE will continue to apply and it will be possible to have separate representatives for TUPE and redundancy consultation purposes.

Information and Consultation

Employee Liability Information (“ELI”)

The 2014 rules amend TUPE to provide that ELI must be provided 28 days rather than 14 days in advance of transfer. The particulars to be provided are:-

- The identity of the transferring employees.
- Their ages.

- Information contained in the statements of employment particulars for those employees.
- Information relating to any collective agreements that apply.
- Details of any disciplinary action within the previous two years.
- Details of any grievances within the preceding two years.
- Details of any legal action or potential legal action by those employees.

If any of the information changes before transfer, the transferor is required to update the transferee on the changes.

Information and Consultation with the Workforce

TUPE places a duty on both transferor and transferee to inform and consult representatives of their employees who will be affected by the transfer or measures taken in connection with the transfer. The information to be provided is:-

- The fact of the transfer, the reason and the approximate date.
- The legal, economic and social implications of the transfer for the affected employees.
- Whether the employer envisages taking any “measures” which will affect the employees.
- Where the transferor is required to give the information he must disclose whether the transferee envisages taking any measures. The transferee must give the transferor this information in order for the transferor to meet his obligations.

If there are any agency workers both the transferor and transferee must specify the number of agency workers, the parts of the business in which they are working and the type of work they are carrying out.

Consultation is only required if any measures will be taken. The consultation must be undertaken with a view to seeking agreement and the employer must consider and respond to any representations made by the representatives. If the employer rejects the representations, he must state the reasons.

Under the 2014 changes micro businesses which are employers with fewer than 10 employees may provide information and consult with affected staff directly rather than through representatives in relation to transfers which take place on or after 31 July.

About us

The Charity and Social Business Team at Russell-Cooke work exclusively with the not for profit sector. We provide legal advice, training, governance support and consultancy across a full range of issues including organisational change.

The Team works with over 600 charities including social care, international aid, religious, environmental and educational organisations as well as a wide range of other types of bodies, professional and learned societies, Housing Associations through to newly formed and community based organisations. Advice includes:

- Governance and constitutional issues
- Property transactions
- Mergers, partnerships and collaborative working
- Employment
- Contracting
- Fundraising
- Tax
- Dispute resolution
- Trade mark and data protection
- Regulatory Issues

The Team consists of six partners and eight professional staff. We are all personally committed to working for the sector. As well as advice, we undertake legal risk audits, training and seminars and produce publications and a monthly e-mail update.

Russell-Cooke has fifty one partners and over two hundred and seventy staff with offices in Central London, Putney and Kingston.

About the speaker

Jane Klauber is a partner in the Charity and Social Business Team. She specialises in employment law advising on a range of contentious and non contentious issues including reviewing policies and procedures, unfair dismissal law, discrimination law and issues arising from restructuring or merging including redundancy and TUPE.

Jane supports the HR departments of a number of large national charities. She provides regular training and workshops to the voluntary sector on employment law changes and managing internal procedures.

Jane is a member of the Employment Lawyers Association.

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