

The Transfer of Undertakings (Protection Of Employment) Regulations 2006 "TUPE"

Revised April 2006.

This information leaflet gives you introductory guidance to the 2006 TUPE regulations. It does not however give you legal advice. If you need legal advice please contact Matthew Parkinson in our Employment department on 01942 774192.

This leaflet:

- Gives a brief history and basic legal principles behind the 2006 TUPE regulations.
- Summarises the latest changes to the 1981 TUPE regulations.
- Looks at when the TUPE regulations apply and the impact of breaching them.
- Outlines the obligations of the transferee [i.e. the buyer] concerning a transfer.
- Outlines the obligations of the transferor [i.e. the seller] concerning a transfer .
- Offers some practical suggestions.

Overview

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (S.I. 2006/246)¹ (referred to here as TUPE) is now the main piece of legislation governing the transfer of an "undertaking", or part of one, to another "undertaking". Usually, in other words, the sale or purchase of one business to another business.

TUPE is designed to protect the rights of employees in a transfer situation enabling them to enjoy the same terms and conditions of work, including their length of time in employment, as they did before. This means an employee starts work on Monday morning for a different employer but works in exactly the same way as s/he did the Friday before and with the time in their employment completely safeguarded and carried on. TUPE 2006 entirely replaces the Transfer of Undertakings (Protection of Employment) Regulations 1981 (SI 1981/1794).

TUPE was introduced to comply with relevant European rules called "EC Directives" concerning transfers of "undertakings". The word "undertakings" is wide enough to cover the majority of sale / purchase arrangements between companies with some limited exceptions e.g. the buying and selling company shares only. If this happens then TUPE will not be relevant. For legal advice on when or if TUPE applies to you please contact Matthew Parkinson in our employment law department on 01942 774192.

If in doubt – shout!

The main European Directives are:

- the Acquired Rights Directive (77/187/EC)
- the Acquired Rights Directive (98/50/EC)

- the Acquired Rights Amendment Directive (2001/23/EC).

In bringing the original Acquired Rights Directive into the law of European member states, a number of problems arose and there have been various amendments to the UK regulations and a great deal of case law as a result. The most recent overhaul of amendments has been subject to an extremely prolonged consultation – some changes affecting pensions came into effect on 6 April 2005 and the core changes of TUPE 2006 came into force on 6 April 2006. The 2006 TUPE regulations now ensure:

- More comprehensive application of the regulations to service provision situations where services are outsourced, in sourced or assigned to a new contractor to achieve greater certainty that TUPE applies to labour-intensive services such as office cleaning, catering, security, and refuse collection.
- The transferee [i.e. buyer] is aware of the employees' rights, obligations and liabilities before transfer.
- Clarification of the circumstances when an Economical Technical or Organisational "ETO" defence (see below) can be applied to change the terms and conditions of employment of an affected employee and in which employers can lawfully make transfer-related dismissals.
- That transfers of insolvent businesses are more viable by introducing greater flexibility to attract potential buyers .
- The transferor [i.e. seller] and transferee [i.e. buyer] jointly and severally liable for any failure to inform and consult with the transferring employees.
- The territorial application of TUPE is extended so that overseas employees may also be caught by the transfer.

The further statutes and regulations which have an effect on TUPE are:

- The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995 (SI 1995/2587).
- The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1999 (SI 1999/1925) .
- Pensions Act 2004, especially sections 257 and 258.
- The Transfer of Employment (Pensions Protection) Regulations 2005 (SI 2005/649).

What is a relevant transfer of an undertaking?

TUPE will apply to what are known as 'relevant transfers' which may occur in a wide range of situations. The two broad categories are business transfers and service provisions changes. Some transfers will be both a business transfer and a service provision change.

Business transfers

The question here is whether there is a transfer of an economic entity that retains its identity. This can be broken into two parts:

- Is there a 'stable economic entity' that is capable of being transferred?
- Will the economic entity retain its identity after the transfer in question?

To decide if there is a stable economic entity that is capable of being transferred, the factors to consider include:

- Is the type of business being conducted by the transferee (incoming business) the same as the

transferor's (outgoing business)?

- Has there been a transfer of tangible assets such as building and moveable property (although this is not essential)?
- What is the value of the intangible assets at the time of the transfer?
- Have the majority of employees been taken over by the new employer?
- Have the customers been transferred?
- What is the degree of similarity of the activities carried on before and after?

If the answer to all (or in some cases several of) the above questions is 'yes', it is safe to assume that there has been a transfer of a stable economic entity and that TUPE does apply. The absence of a profit-motive is not a determinative factor.

Service provision changes

A service provision change occurs when a client who engages a contractor to do work on its behalf is either:

- Reassigning such a contract, or
- Bringing the work 'in-house' (a service provision change).

It will not be a service provision change if:

- The contract is wholly or mainly for the supply of goods for the client's use, or
- The activities are carried out in connection with a single specific event or a task of short-term duration.

In what situations does TUPE apply?

By way of broad guidance TUPE has been found to apply to:

- Mergers .
- A change of licensee or franchisee.
- The gift of a business through the execution of a will.
- Contracting out of services .
- Changing contractors.
- Where all or part of a sole trader's business or partnership is sold or otherwise transferred.

However, TUPE does not apply to:

- Transfers by share take-over.
- Transfers of assets only (for example, the sale of equipment alone would not be covered, but the sale of a going concern including equipment would be covered).
- Transfers of a contract to provide goods or services where this does not involve the transfer of a business or part of a business.
- The supply of goods for a client's use, for example, supplying food to a client to sell in its staff canteen, rather than a situation where the contractor runs the canteen for the client.

The law on relevant transfers in the case of contracting out and changes of contractors for labour intensive activities, such as security, catering, refuse collection and cleaning, has given rise to confusion in the past. Many of these

difficulties have been resolved by TUPE 2006. All these situations are covered under TUPE 2006.

Impact of a breach of the TUPE regulations

If a TUPE transfer applies, all terms and conditions of work and continuity of employment should be preserved. This principle now applies to all employees who were employed in the entity transferred immediately before the transfer; and those who would have been so employed if they had not been unfairly dismissed for a reason connected with the transfer.

Subject to a one year qualifying period, such a dismissal will be automatically unfair for a reason connected with the transfer unless it is for an 'Economic, Technical or Organisational' (ETO) reason (see below).

The table below sets out three different categories of dismissal and whether they are fair or unfair.

Information

From 6 April 2006, transferors became obliged to give the transferee written information about the employees who are to transfer and all the associated rights and obligations towards them. This information includes, for example, the identity and age of the employees who will transfer, information contained in the employees' written particulars of employment under section 1 of the Employment Rights Act 1996, information relating to any collective agreements, instances of any disciplinary action within the preceding 2 years taken by the transferor, instances of any grievances raised by those employees within the preceding 2 years, instances of any legal action taken by those employees against the transferor in the preceding 2 years and details of any employee claims that the transferor reasonably believes might be brought against him in the foreseeable future.

This information must be given not less than 14 days before the date of the relevant transfer [i.e. completed sale or grant / re-grant of a lease] or, in special circumstances, as soon as reasonably practical thereafter. Any changes in the information must also be notified in writing to the transferee.

If the transferor does not provide this information, the transferee may apply to an employment tribunal for such amount as it considers just and equitable. Compensation starts at a minimum of £500 for each employee in respect of whom the information was not provided or was defective.

Consultation and notification

The transferor and the transferee have a responsibility to conduct a full and meaningful consultation with employees or their representatives at the earliest practicable time.

What information must be given?

- That the transfer is going to take place, approximately when and why.
- The legal, economical and social implications of the transfer for the affected employees.
- Whether the employer envisages taking any action (e.g. reorganisation) in connection with the transfer which will affect the employees and if so, what action is envisaged.

Type of Dismissal

Dismissals for which the sole or principal reason is the transfer itself, or a reason connected with the transfer that is not an ETO reason.

Dismissals for which the sole or principal reason is not the transfer itself, but is a reason connected with the transfer that is an ETO reason.

Dismissals for which the sole or principal reason is unconnected with the transfer.

- The previous [outgoing] employer must disclose whether the prospective [incoming] employer can see carrying out any action which will affect the transferring employees. The new employer must give the previous employer the necessary information so s/he is able to meet this requirement.

Failure to conduct consultation results in liability for the payment of compensation which may be up to 13 weeks' pay. Compensation starts at a minimum of £500 for each employee. The transferor and transferee are both liable for any award of compensation made by an employment tribunal for failure to inform and consult.

Fair or Unfair

Automatically unfair under the unfair dismissal legislation.

Potentially fair subject to the normal test of reasonableness under the unfair dismissal legislation.

These fall outside TUPE as they are unrelated to a relevant transfer and the usual unfair dismissal principles will apply. This is the case even though the dismissals may be made around the time of such a transfer.

Liability passing on to the incoming contractor

The transferee takes over the liability for all statutory rights, claims and liabilities arising from the contract of employment, for example liabilities in tort, unfair dismissal and discrimination claims. The exception to this rule applies to criminal liabilities.

Pensions

Strictly speaking, obligations relating to provisions about benefits for old age, invalidity or survivors in employees' occupational pension schemes do not transfer under TUPE. However, the provisions of the Pensions Act 2004 sections 257 and 258 do apply to transfers taking place after 6 April 2005. In effect, this means that provisions equivalent to the TUPE regulations apply to pension rights from that date. In essence, if the previous employer provided a pension scheme then the new employer has to provide some form of pension arrangement for employees who were eligible for or members of the old employer's scheme. It will not have to be the same as the arrangement provided by the previous employer but will have to be of a certain minimum standard specified under the Pensions Act.

Are there any 'defences' to prevent the TUPE regulations applying?

The economic, technical or organisational (ETO) reason relating to the entity which is being transferred is one of the few legitimate factors for the basis of a refusal to take on the transferor's workforce by the prospective transferee. The reason has to be the main cause of the dismissal, thus making the dismissal justifiable provided an employment tribunal decides that the employer acted reasonably in all the relevant circumstances. If it can be shown that the economic reasons were a 'sham' and that the workforce were not taken on in order to avoid the application of the TUPE regulations, then the transferee could be liable for potential claims.

Employees with less than one year's service cannot present claims under TUPE, as employment protection rights have not been accrued.

Practical suggestions

TUPE is a complex area so it is essential to seek legal advice for individual circumstances. Where a business, or part of one, is being transferred, both parties (i.e. the transferor and the transferee) should seek such advice at the earliest possible stage. It may be possible for a legal representative to negotiate an indemnity which will provide a partial, or total, cushion against the financial impact of any claims resulting from the application of TUPE.

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