

Strategic HR Forum June 2017 – Discussion paper Transfer of Undertakings Protection of Employment (TUPE)

Introduction

The Transfer of Undertakings (Protection of Employment) Regulations 2006 as amended by the "Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014 are the main pieces of legislation that covers an employees right to be transferred to another employer with their assigned undertaking and remain on the same terms and conditions with continuity of employment.

TUPE is well used across Local Government because it applies to a number of different circumstances, including outsourcing. An employer can have employees transfer in or transfer employees out, dependant on the situation. Due to the implications of TUPE, it's an important factor to consider when embarking on any project involving employees and the transfer of undertaking.

ACAS has a number of useful guides that can be found on this link.

<http://www.acas.org.uk/index.aspx?articleid=1655>

When does TUPE apply?

An employer cannot choose whether to apply TUPE. It occurs when a business transfer or a service provision transfer takes place and involves the employees who are assigned to that undertaking. TUPE applies in the following circumstances:

- mergers
- sales of businesses by sale of assets
- a change of licensee or franchisee
- the gift of a business through the execution of a will
- transfers out of companies in administration
- contracting out of services
- changing contractors
- situations where all or part of a sole trader's business or partnership is sold or otherwise transferred.*

TUPE doesn't 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)
- buying in services from a contractor on a one-off basis - rather than entering into an ongoing relationship for the provision of the services
- a situation where there is a change of business identity, for example if the nature of the work or the organisational structure changes radically
- the supply of goods for the 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).
- transfers of undertakings situated outside the UK (although these may be covered by the regulations of other member states).(Source: CIPD)

What it means to the employer

When TUPE applies there is a direct effect on employees assigned to the undertaking. The employee should transfer automatically along with all their **rights, duties and liabilities**.

The employer has a **duty to consult** with employees as soon as reasonable possible when TUPE is proposed. There is a penalty if the employer fails to do this (13 weeks gross pay).

Transferred employees have protection from **dismissal** where the principle reason for dismissal is the transfer, unless there is an **Economic, Technical or Organisational reason** (ETO). If an employee is dismissed because of the transfer, their dismissal is automatically unfair.

Transferred employees **terms and conditions** are protected following transfer. Unless there is an ETO reason for making changes in the workforce and the employee(s) agree, variations to the employment contract will be void if the reason for the variation is the transfer. The exception to this is collective agreements, which can be changed one year after the transfer, providing that the new terms and conditions are more favourable.

When an employer is transferring an undertaking to another organisation, it has a duty to **provide information** to the new employer by a certain date. This information includes employee data and information confirming current terms and conditions.

The ETO

Although harmonising terms and conditions can be seen as positive, TUPE works to protect current terms and conditions unless an ETO reason is present. The CIPD provide examples of these:

Economic reasons

The demand for output has fallen to such an extent that profitability of the entity is unsustainable without dismissing staff.

Technical reasons

The transferee wishes to use new technology and staff employed by the transferor in the entity do not have the requisite skills.

Organisational reasons

The transferee operates at a different location and it is not practical to transfer staff.

Therefore, employers must be aware that harmonising terms and conditions is not always possible when employees transfer to their employment.

Impact of Brexit?

TUPE derives from an EU directive. It is possible that there will be changes to the legislation once the UK leave the EU. Until this happens, it's unclear whether changes will be made and/or how these will impact on UK organisations. The CIPD believe that one change maybe to increase the scope of the ETO reasons, which may enable the dismissal of employees before a transfer.