

TRANSFER OF UNDERTAKINGS & TUPE

The EC (Protection of Employees on Transfer of Undertakings Regulations) Regulations 2003 SI 2003/131), also known as TUPE provides protection to employees where there is a business transfer involving a change of employer.

While the protection afforded by TUPE is welcome by employees, it can have commercial ramifications for the vendor and purchaser of a business to which TUPE applies. A key consideration in the sale or purchase of a business is whether TUPE applies. This factsheet aims to assist practitioners in identifying when TUPE applies and the implications of TUPE applying.

WHEN DOES TUPE APPLY?

TUPE applies to any transfer of an undertaking, business, or part of an undertaking or business from one employer to another employer as a result of a legal transfer (including the assignment or forfeiture of a lease) or merger.

For TUPE to apply there must be a change of employer. TUPE does not apply to share transfers. While the ownership of shareholding may have changed, the identity of the employing company will remain unchanged. As there is no change in employer, TUPE does not apply.

While share sales are not covered by TUPE, the definition of a transfer encompasses a wide range of other transactions including business sales, mergers, takeovers, surrender of a lease and lease purchase agreements for example. The decisive criteria for establishing the existence of a transfer under TUPE is that the entity in question retains its identity. This is indicated by the fact that its operation is actually continued or resumed.

In order to determine whether the identity of an undertaking is retained, it is necessary to consider all of the facts characterising the transaction concerned, in particular:

- the type of undertaking or business concerned;
- whether tangible assets are transferring e.g. premises, equipment, vehicles, stock;
- the value of the business's intangible assets e.g. goodwill, intellectual property;
- whether the majority of employees are being taken over by the transferee;
- whether clients or customers are transferring;
- whether pre-and post-transfer activities will be similar; and
- the period of suspension of any activities.

The degree of importance attached to each factor will vary according to the activity carried on in the particular business.

IF TUPE APPLIES, WHAT IS THE EFFECT ON EMPLOYEES?

The employees of the transferor business automatically transfer to the transferee business-

- with their continuity of employment intact; and
- (subject to one exception in respect of pensions) on the same terms and conditions of employment, whether contractual or implied;

IS THERE A SERVICE REQUIREMENT FOR TUPE TO APPLY?

No. TUPE applies irrespective of the length of service of the employees.

Employees on maternity leave, paternity leave, parental leave, carer's leave or sick leave also come within the scope of the transfer.

WHAT ABOUT FIXED TERM OR PART TIME EMPLOYEES & AGENCY STAFF?

All employees who are full or part time, on fixed term contracts or permanent contracts are covered by the TUPE regulations.

In the case of agency workers, normally the person who is liable to pay the employee's wages (either the agency or the client company) is deemed to be the employer for the purposes of the TUPE regulations.

Generally, a short term temporary worker on a temporary assignment in an end user organisation's business is unlikely to transfer if the end user organisation business transfers. Such temporary workers would generally revert to the employment agency.

However, where longer term agency workers have "implied" contracts of service with the business being transferred, they transfer as employees of the business being transferred. Whether agency workers transfer will require an analysis on a case by case basis. TUPE may still apply to an agency worker engaged on a long term basis in an end user organisation, even if the pay is arranged through an agency. The more embedded the individual is in the end user organisation, the longer the assignment, the greater the prospect of the worker being considered an employee of the end user organisation, in which case they would transfer, along with directly hired employees.

Transferors should not assume just because an individual is an agency worker that they do not transfer under TUPE.

IS THERE AN OBLIGATION TO INFORM AND CONSULT?

Regulation 8 of TUPE confers a joint obligation on the transferor (old employer) and the transferee (new employer) to inform their respective employees' representatives/employees of the following:-

- The date or proposed date of the transfer;
- The reasons for the transfer;
- The legal implications of the transfer for the employees and a summary of any relevant economic and social implications of the transfer for them. Social implications would include any impact the transfer has on the employees' pension rights. Economic implications would include potential redundancies post transfer or alternatives to redundancy such as pay cuts or redeployment;
- Any measures envisaged in relation to the employees. Such measures would include re-location to different premises, changes to reporting lines or changes to work practices for example.

The obligation to consult arises only where there are measures envisaged by either the transferor (old employer) or the transferee (new employer) in relation to the employees. The Regulations state that the consultation must be carried out “with a view to seeking agreement”. Irrespective of whether the obligation to consult arises, if TUPE applies employees should meet with the employees concerned to discuss or allay any concerns they may have.

The information set out above must be given to the transferring employees where reasonably practicable not later than 30 days before the transfer is carried out and in any event in good time before the transfer is carried out.

If the obligation to consult arises, it must occur where reasonably practicable not later than 30 days before the transfer is carried out and in any event in good time before the transfer is carried out.

WHO WILL BE LIABLE FOR BREACHING THE 30 DAY TIMELINE?

The position is somewhat unclear. A dissatisfied employee will likely take a case against both the transferor and transferee. For this reason, both should ensure this obligation is discharged. It is notable however that under TUPE all liabilities transfer to the transferee company.

WHAT IF THE TRANSFER IS IN RESPECT OF A CONFIDENTIAL, COMMERCIALY SENSITIVE MERGER? DOES THE 30 DAY TIMEFRAME STILL APPLY?

Yes. There is no waiver for this requirement. In a recent case before the Labour Court¹, a transferor company argued that it was not reasonably practicable to consult with the employees 30 days in advance of the transfer. The reason advanced was that it needed to maintain confidentiality during the commercial negotiations. The company involved was a publicly listed company. The Labour Court held that the transferor did not comply with its obligation and was liable for the failure to inform and consult. The Labour Court awarded the maximum compensation for this being four weeks’ remuneration to the employee concerned.

¹ OSC One Complete Solution v Paul Grant [TUD186]

WHAT ARE THE RISKS IN NOT COMPLYING WITH THE 30 DAY TIMEFRAME?

Under the TUPE regulations, each employee can take a claim to an Adjudication Officer in the Workplace Relations Commission. An Adjudication Officer can award up to four weeks remuneration per employee.

There is also the risk that the employees could seek an injunction restraining the transfer until the 30 day limit has expired.

CAN TERMS AND CONDITIONS OF EMPLOYMENT BE VARIED PRE AND POST TRANSFER?

Not if the variation is linked to the transfer. Transferring employees transfer on the same terms and conditions of employment. No variation of the terms and conditions of the transferring employees, linked to the transfer, is permitted.

CAN A TRANSFEREE DISMISS EMPLOYEES POST TRANSFER?

Dismissals by reason of the transfer only are prohibited. However, dismissals are permitted for 'economic, technical or organisational reasons entailing change in the workforce' ("ETO reasons").

While there is no statutory definition of the phrase "economic, technical or organisational reasons entailing changes in the workforce", it has been held to encompass a redundancy situation. It would be considered a "measure" that would trigger the requirement to consult with the employees before the transfer takes place. Generally, it is accepted that the ETO reasons are as outlined below:-

Economic grounds are those which concern the profitability or market performance of the business post-transfer and the cost of running the business.

Technical grounds are those concerned with a need for different technical skills which will be required in running the business post transfer.

Organisational reasons refer to reorganisation of the work done such that it is different in some structural, departmental, administrative or managerial way

CAN A TRANSFEREE DISMISS THE NEWLY TRANSFERRED EMPLOYEES FOR ETO REASONS AND RETAIN THEIR OWN STAFF?

No. Transferees need to bear in mind that the transferor's employees and the transferee's employees have to be pooled together for consideration for redundancy selection. This is extremely important. It is not a case of selecting those employees who have just transferred to the transferee for redundancy. Instead, what is required is that the transferred employees are pooled with the transferee's employees for redundancy selection. Failure to correctly pool the employees for redundancy selection could leave the transferee exposed to a successful claim under the TUPE regulations or the unfair dismissals legislation.

WHAT IF AN EMPLOYEE REFUSES TO TRANSFER?

Transfers of employment by virtue of TUPE are automatic irrespective of the wishes of the parties involved.

If an employee refuses to transfer, that refusal will generally be treated as a resignation rather than a redundancy situation.

CAN TUPE APPLY TO PROPERTY TRANSACTIONS?

Yes. To determine whether TUPE applies, the first question is whether the property is an undertaking that will retain its identity after it has been transferred. If so, it is likely that TUPE will apply.

For example if a freehold or leasehold interest is sold in a hotel which continues as a hotel post transfer, it is likely that TUPE will apply. If however, the hotel was to be sold and redeveloped as an apartment block, TUPE would be unlikely to apply as the hotel has not retained its identity after the transfer.

DOES TUPE APPLY TO A CHANGE OF SERVICE PROVIDER E.G. CHANGE OF CLEANERS OR CHANGE OF SECURITY STAFF?

A simple changeover of service provider is not a transfer under TUPE. For TUPE to apply to a change in service provider there must also be:-

- An associated transfer of assets or

- The taking over of a major part of the workforce in terms of numbers of skills.

The tribunals and courts tend to examine whether the function of the employee being transferred is either:-

- Labour intensive refers to services where there is reliance on manpower alone e.g. security service / cleaning. One should look at whether there is a transfer of the workforce.
- Asset reliant refers to roles that are reliant on assets for example manufacturing. The determining factor for whether TUPE applies is whether assets have been transferred.

In a labour intensive undertaking the incoming contractor can determine whether TUPE applies by deciding to take over the workforce or not.

In an asset reliant undertaking, even if the incoming contractor takes over the majority of the workforce, TUPE may not apply if there is no transfer of the assets.

ARE THERE CONSEQUENCES FOR BREACHING TUPE?

If an employer has breached TUPE, an employee can bring a complaint to the Workplace Relations Commission (“the WRC”). The WRC will can appoint an Adjudication Officer who can:-

1. Declare that the complaint is or is not well founded;
2. Require the employer to comply with the Regulations and order a specified course of action in that regard;
3. Require the employer to pay the employee compensation which in the case of compliance with the 30 day timeframe to inform and consult shall not exceed 4 weeks’ remuneration per employee and in the case of contravention of any of the other regulations, compensation not exceeding a sum equivalent to two year’s remuneration.

The recommendation of the Adjudication Officer is binding on the employer. Provided that the employees have the requisite service, they can bring a claim under the Unfair Dismissals legislation.

The remedies available are reinstatement, re-engagement in a different position which would be reasonably suitable for the employee or compensation based on financial loss not exceeding a sum equivalent to two year's remuneration.

CAN AN EMPLOYEE BRING AN ACTION UNDER TUPE AND UNDER UNFAIR DISMISSAL LEGISLATION?

No. Employees must choose one avenue of redress.

LEGAL NOTICE

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