



## TUPE Service Provision Changes

### Guide to the Transfer of Undertakings (Protection of Employment) Regulations 2006 (as amended by Collective Redundancies and Transfer of Undertakings Regulation 2014) ('TUPE')

#### Simplifying TUPE

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This note is designed to help if you are involved in the provision of services to a particular client.

If a change to the provision of the services is being considered, it is important to check whether the TUPE rules apply. You might be one of the following:

- An employer who has won or lost a bid;
- An affected employee (or a group of employees); or
- An elected representative

The TUPE regulations set out procedures and standards to be applied when employees are going to be transferred. Whilst these regulations can seem complex one of the best ways to use the procedure is to discuss the impact of changes with employees to make sure that there is 'no material detriment', for example by making agreed accommodations.

If an employee freely objects to the transfer, then there are no legal consequences. Whatever, you do, make sure that you have a strong legal position and that you apply a positive approach to any discussions.

#### Assistance with TUPE issues

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I can help with the following:

- Training for Elected Representatives - *the TUPE regulations and how to negotiate safely*
- Training for managers and line manager – *introducing service provision changes & avoiding legal challenges*
- Advice to employers on TUPE and issues arising
- Advice to employees on TUPE and negotiations with the transferee



- Defending/Bringing Employment Tribunal claims

For details about my experience in TUPE claims you can see my [press page](#) or google: 'Gordon Turner TUPE cases'.

## **TUPE: The main issues**

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This note is structured under the following headings:

- A. TUPE - bids for public sector service contracts
- B. Avoiding expensive TUPE challenges
- C. When does TUPE apply?
- D. Key dates
- E. Which employees transfer?
- F. Protection of existing terms and conditions and when can changes be made?
- G. Changes and collective agreements
- H. Dismissals and constructive dismissals related to TUPE

### **A. TUPE - bids for service contracts**

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TUPE tends to affect the following types of service provision contracts:

- Information Technology - IT/ICT
- Catering
- Cleaning
- Professional services - Law/Accounting/Surveying/etc.

Some changes to TUPE were made in 2014 but they have not significantly changed the rules. They are intended to allow more flexibility for employers, whilst maintaining protections for affected employees.

When bidding for contracts, assessing the costs of transferring employees needs to be factored in.



## **B. Avoiding expensive TUPE challenges**

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Employers who get TUPE wrong can face expensive challenges in Employment Tribunals:

- Failure to inform and consult – compensation of up to 13 weeks' gross pay
- Automatically unfair dismissals - dismissals around TUPE transfers- the Basic Award and compensation for future lost earnings
- Unrecoverable legal costs
- Commercial problems - lack of resources to fund the overheads connected with provision of a contract

The best way to minimise risk is to use the requirement to inform and consult proactively and to ensure that information is exchanged quickly (it is called 'Employee Liability Information') so that employee issues can be addressed before the transfer.

## **C. When does TUPE apply?**

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There are 2 types of TUPE transfer:

- The transfer of an entity or part of an entity as a 'going concern' (normally through a purchase or takeover); and
- A service provision change ('SPC') - where a client changes the provider of services by:
  - Outsourcing the services
  - Insourcing the services
  - Transferring the services between an existing service provider and a new provider

This is not always a straightforward question; if the contract is broken up ('fragmented') or if the services are to be provided in a different way, then TUPE may not apply.

### **Checklist: Does TUPE apply?**

- ✓ Is a client considering changes to the provision of services?



- ✓ Is there a group of employees which is deliberately organised by the present employer, to provide services for that client?
- ✓ Will the client remain the same after the transfer?
- ✓ Will the client continue to function in fundamentally the same way after the transfer?
- ✓ Does the contract relate mainly to the supply of services and not goods (if mainly goods then TUPE may not apply)?

**Checklist: TUPE may not apply**

- ✓ Will the service provision become fragmented- split up amongst a group of service providers?
- ✓ Will the services be provided in a fundamentally different way?
- ✓ Will the client change?
- ✓ Does the service provision contract relate to goods, not services?
- ✓ Does the contract relate to a 'one off' provision of services?

**D. Key Dates**

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With TUPE, it is very important to understand the milestones and work with them in mind. The main dates to look out for are:

- The date of the transfer of the services
- Supply of employee liability information- this must be 28 days before the transfer date
- Consultation requirements - where more than 20 employees are likely to be made redundant within a 90 day period - more stringent rules apply on the appointment of representatives
- Where under 20 employees are to transfer- consultation to take place in 'good time'



### **E. Which employees transfer?**

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Only those employees who are part of an 'organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of activities concerned on behalf of the client' will transfer.

Examples include:

- A group of cleaners who mainly work at one major client's premises
- IT contractors who mainly provide services to a school
- Solicitors who mainly provide legal services to one building society

The regulations are intended to make sure that the 'team' transfers along with the contract. There might be a dispute as to which employees are assigned to that contract. In real terms, they may spend more time working for other clients. Sometimes a 'group' can be just one person. Information about this can be obtained at the stage the present employer supplies employee liability information and in individual consultation.

The new employer will conduct 'due diligence' enquiries with the present employer.

### **F. Making changes after a TUPE transfer**

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This is normally one of the main issues with TUPE transfers.

The new employer may want to make changes to the way the service is provided. The client may want to change the service provider due to the need to keep up with market or political pressures and so may be unhappy to find that the new provider is made up of the old team! The 2014 TUPE changes are designed to ease the restrictions on change but there are still important rules protecting transferring employees against unfair changes and it is important to handle any changes with great care.

One of the main differences is that in most cases, the new employer will not be forced to locate the employees at or near their present workplace. If this is not realistic then the new employer can consider dismissals.

- The starting point is that the new employer must keep to the transferring employees' terms and conditions
- In addition the new employer must not impose substantial changes to broader 'working conditions' which cause 'material detriment' to the employees. Working conditions do not have to be contractual.



## Forbidden changes

If the 'sole or principal' reason for the proposed changes is the transfer itself then the changes will be void and unenforceable, even if the employees have agreed to them. Enforced changes may also be seen as constructive dismissals.

However, if there are other reasons, such as commercial or political requirements, then *they* (not the TUPE transfer) may be the reason for the changes, in which case they will be permitted.

For this reason, whenever changes are contemplated, be prepared to explain the reasons for the change and have sound evidence that this (not the transfer itself) is the reason.

## Changes to contracts for Economic, Technical or Organisational Reasons ('ETO' changes)

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ETO's can only apply where the reason 'entails changes in the workforce'. This means changes:

- To workforce numbers
- Job functions
- The location at which the workers are based

There are 3 main ways changes can be validly introduced:

- If there are valid business reasons for the change and the employees agree to them, if the sole or principal reasons are ETO reasons.
- The terms of the employees' existing contracts permit the changes- for example, variation clauses or mobility clauses.
- If a new development, such as the needs of the client require it.

## Checklist: Changes to contracts

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The *reason* why the changes are needed is key so being clear about this at both the planning and consultation stage is very important- this is definitely an area where legal advice should always be taken.

- ✓ Is there a reason (other than the TUPE transfer- eg: harmonising with the existing workforce's terms- which is not permitted) for the proposed change?



- ✓ Do you have evidence of the reason for the change?
- ✓ Have you provided details to the employees and offered to negotiate?
- ✓ Do the changes fall within the ETO definition (above)?

### **G. Collective agreements**

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Where unions are involved in negotiating terms and conditions, the new rules permit renegotiation but only after one year; provided the overall contractual terms are no less favourable.

Collectively agreed changes agreed *after* the date of the transfer will not transfer; if there are on-going discussions and they are not concluded before the transfer date, then the new employer should not be affected.

This is a way in which changes can be introduced but it is a specialist area and advice should be taken on specific issues.

### **H. Dismissals & Redundancies**

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TUPE is designed to protect employees against dismissals if the *sole* or *principle* reason is the TUPE transfer itself. An employer who dismissed employees because of the TUPE might face large claims and it is relatively easy to establish liability; such dismissals are seen as 'automatically unfair'.

However, TUPE protection does *not* apply to employees who would have been made redundant *regardless* of the transfer so an employer who is thinking of making redundancies and in the future may be changing the service provision would be wise to start the redundancy procedure as quickly as possible.

A time gap before the transfer may help to establish the reason for the dismissal was not the sole or principal reason.

#### **Checklist: redundancies**

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- ✓ Is there a decline or anticipated decline in your organisation's requirements for employees carrying work of a particular kind?
- ✓ Is this due to a reason *other* than the contemplated TUPE transfer?
- ✓ What is the reason?



- ✓ Is there strong evidence to show what the reason for the redundancies is?

## Constructive Dismissals

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When an employer is thinking of dismissing employees, the procedures and issues can be clearer and easier to explain; there is normally time to plan ahead and set out the facts. A more difficult area, which can crop around TUPE, is the *constructive dismissal*. These can come out of the blue.

The basic test for a constructive dismissal requires a breach of an important contractual term in an employee's contract. Sometimes, this can be an *anticipated* breach- an employer has made it clear that they intend to break an important term. In TUPE situations, if the new employer is indicating that the contract can be broken this can create problems for the existing employer.

There are important *implied* terms in contracts of employment. One of the most important ones is the term of *trust and confidence*- any serious act or omission by an employer could be a breach of this term. The employee must resign in response to that breach.

This is another reason for being fair and reason and providing clear explanations. Showing that you are willing to deal with these issues would make it difficult for an employer to establish a constructive dismissal.

## TUPE & Constructive Dismissals

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Under **Regulation 4(9)** employees are protected from substantial changes to working conditions to the material detriment of the employee. This is a special provision which only applies in TUPE situations. Working conditions do not have to be in a contract; as long as they are important and established.

The **Department for Business Innovation & Skills** guidance refers to a major relocation of the workplace as an example which 'makes it more difficult or much more expensive for an employee to transfer'. An employer who addresses the costs or expenses of this would have a stronger case for saying that there was no material disadvantage.

## Notification & Consultation

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This is the most important part of the procedure: employees who are treated fairly may well transfer; if they do not, they should not have reason to bring tribunal claims.

An important change in 2014 is the right of the new employer, where it is considering making or 20 or more redundancies, to start consultation about post transfer redundancies *before* the transfer date although the selection for redundancy must not take place until *after* the transfer date.



The new employer will have to look at all employees in the relevant 'pool' including employees at the new place of employment.

- ✓ Will there be less need for employees after the transfer?
- ✓ Are you considering making 20 or more employees redundant?
- ✓ Have you identified the relevant pool of employees?

### **Checklist: Employee liability information**

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The previous employer has a duty to supply the new employer with certain information about the existing workforce:

- ✓ A list of the transferring employees
- ✓ Age of transferring employees
- ✓ Employment particulars of transferring employees
- ✓ Disciplinary and grievance records of transferring employees
- ✓ Details of any relevant collective agreements
- ✓ Details of any outstanding claims the transferring employees have against the outgoing employer

For advice and assistance anywhere in England, please feel free to give me a call:

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