



EMPLOYMENTGUIDE



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TRANSFER OF UNDERTAKINGS (PROTECTION OF EMPLOYMENT) REGULATIONS 2006 ('TUPE')

Main aim and effect

The main aim of the TUPE is to safeguard the rights of employees when the "undertaking" in which they are employed transfers from one employer to another. The basic effect is that the rights and liabilities under the employees' contracts of employment transfer from the old employer (the transferor) to the new employer (the transferee).

When does TUPE apply?

TUPE applies when there is a relevant transfer of an undertaking. An undertaking is a stable economic entity, in which people and assets are organised together to carry out an economic activity.

An undertaking does not have to be profit making. Also, it may have few, if any, significant assets other than its workforce. It must, though, be something more than merely an "activity". In general, there will be a relevant transfer of an undertaking if the undertaking in question continues to operate largely as before the transfer, ie the economic entity retains its identity.

An entity retains its identity if its assets, customers or employees are transferred. The degree of similarity between the activities before and after the transfer and the period (if any) in which they are

suspended are also relevant. Different rules apply for a service provision change (see below).

Relevant transfers may include:

- III the gift or sale of a business from one organisation/company/person to another;
- III transferring a distributorship/agency, or a lease, from one company to another;
- III the transfer of a business between two companies in the same group; or
- III a service provision change, which normally involves the contracting out (or back in) of services, or transfers of contracted out services between service providers.

To be a relevant transfer, a service provision change does not need to involve the entity retaining its identity following the transfer. It is generally enough that employees are organised with the purpose of carrying on certain activities and that those activities continue after the transfer.

TUPE does not apply to transfers: (i) when only the shares or assets of a business are bought and sold; (ii) when one specific contract of short duration is transferred for the transferee to complete.



Who or what transfers?

Upon a relevant transfer, all rights and liabilities under the employment contracts of employees engaged in the undertaking transfer to the transferee. This includes terms on pay, holiday and sickness entitlement, bonuses/profit share schemes, length of continuous service, terms under collective agreements and employer contributions to personal pension schemes. Rights under occupational pension schemes applying at normal retirement date do not transfer. However, transferees are obliged to make alternative pension provision for those eligible to join the transferor's

occupational scheme.

Employees may object to the transfer. If they do, they are regarded as having resigned and lose all employment rights, including the right to claim unfair dismissal. This is not the case, though, if they resign because of a change to terms of employment (see below).

Changing terms of employment

If, because of the transfer, there is a substantial change made or proposed to the employees' working conditions to their detriment, then employees can either: (i) resign and claim automatic unfair dismissal; or (ii) carry on working and make an "unlawful deductions of wages" claim where appropriate. Employees can also resign and claim automatic unfair dismissal if the change in identity of employer is substantial and to their detriment.

Changes to terms of employment "in connection with the transfer" can be deemed void, even if employees agree to them. Changes will not be void, however, if the sole/principal reason behind them is an "economic, technical or organisational

reason entailing changes in the workforce" (an ETO reason). An ETO reason will work only if it also involves changes to the numbers or functions of the workforce and not just changes to contractual terms.

If the employee resigns before the transfer takes place as a result of changes to terms that the transferee proposes, liability for constructive dismissal will remain with the transferor. If he/she resigns after the transfer, the transferee is responsible. Changes can also be made if they are not "connected to the transfer". This is likely to be the case if the changes affect all the workforce of the transferor or of the transferee at a suitable point following the transfer, eg at the start of a new financial year. It is recommended that this should still be at least 12 months after the transfer, but even then their effectiveness is not guaranteed. Advice should be taken if changes to terms of employment are being contemplated.

Employees dismissed as result of transfer

Any dismissal of an employee in connection with the transfer is deemed automatically

unfair. Employees must have at least one year's continuous service to make a claim. If the transferor carries out the dismissal before the transfer, liability will pass to the transferee. If the transferee dismisses, he is again liable. There is a defence if the employer can show that the dismissal was for an ETO reason. A common ETO defence is that of redundancy. To avoid unfairness, the dismissal must also be reasonable and implemented fairly under unfair dismissal law.

Information & Consultation

The transferor/transferee needs to provide the following information to any of their employees affected by the transfer (and employees may be affected even if they do not transfer):

- III that the transfer is to take place and when it is to take place;
- III the reasons for the transfer;
- III the legal, economic and social implications of the transfer for affected employees, including any impact on their continuity of employment, workplace, pay, benefits and other terms (including pensions); and
- III what measures are to be taken by the transferor and the transferee. Measures tend to be proposed dismissals, restructuring, redundancies or changes to terms of employment either before or after the transfer.

If there are measures planned for any affected staff, the transferor/transferee needs to consult with the employees' representatives by listening to any comments made and replying to them. The information



needs to be in writing and given to the appropriate employee representatives, who may need to be elected for the purpose. The information needs to be provided in enough time to allow for consultation if necessary. If the employer fails to inform or consult with employees or their representatives, they may apply to a tribunal for compensation. The maximum award is 13 weeks' pay for each affected employee, although where attempts have been made to comply with the duty, lesser awards may be appropriate. Liability is split between the transferor and transferee. Also, providing inaccurate information may, in certain circumstances, open the way for employees to bring negligence actions against the transferor/transferee.

Obligation of transferor to provide information about transferring employees

As well as the duty to inform and consult employee representatives, the transferor must also provide certain information about the employees to the transferee, including:

- the identity and age of the employees;
- statements of terms of employment;
- disciplinary proceedings or grievances brought in the last two years;
- court/tribunal cases brought in the last two years and those which it reasonably expects employees might bring; and
- any collective agreement which will have effect after the transfer.

This information must be accurate within two weeks, kept up to date and provided at least two weeks before the transfer. Failure to comply entitles the transferee to bring a

tribunal claim against the transferor. The minimum award is £500 per employee.

Transferors and transferees should also be aware of their obligations under the Data Protection Act 1998. The Information Commissioner has published guidance on the disclosure of employee information under TUPE.

Insolvency

If a business is under insolvency proceedings with a view to liquidating the assets, TUPE does not apply. Where the insolvency proceedings are aimed at saving the business, TUPE is more likely to affect dismissals carried out with a particular buyer in mind rather than for the immediate survival of the business. If the business does transfer under TUPE, the normal rules about liability passing to the transferee apply (except for liability for certain statutory payments, such as statutory redundancy or

notice pay, which remain with the transferor or for employees to claim back from the Department for Business, Enterprise and Regulatory Reform).

Also, "permitted variations" to employment contracts can be agreed with the employee representatives in insolvency situations. A permitted variation is one which is designed to ensure the survival of the business and therefore safeguard jobs, eg an agreement to cut pay. This is a special rule in insolvency situations and must be collectively agreed.

This Guide is intended to be a general guide to TUPE. If you have any specific questions about your own circumstances, please contact a member of Martineau's Employment & Pensions Group for definitive advice on:

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