

MA/PGDip in Strategic People Management

**Advanced Application of Employment Law
BMHR7019**

Task 1

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MEMORANDUM

To: *BBL Management Team*

From: *Sarah Cosker – HR Manager*

Date: 23.02.2022

Subject: *Response to specific questions (TUPE, Redundancy, change to Terms and conditions).*

1. TUPE

TUPE is the Transfer of Undertakings (Protection of Employment) Regulations 2006, protecting employees in the UK if there is a ‘relevant transfer’ in the organisation they work for (ACAS,2016).

There are two forms of TUPE, firstly, a ‘Business Transfer’, where a business or part of a business’s assets move from one employer to another, this includes the transfer of staff (Lewis and Sargeant,2020.p327).

Secondly, there is the ‘Service Provision Change’, when a contract ends and is taken over by a new contractor, or when a service is contracted out or transferred back in-house (Lewis and Sargeant,2020.p327).

To be considered a Service Provision Change rules under TUPE state that the transfer must include a supply of services (not a one-off provision) and that before the transfer the following must apply:

- *“An organised grouping of employees*
- *Employees should be assigned to the group*
- *The client should remain the same*
- *The activities should not become overly fragmented*
- *The activities should remain fundamentally the same”* (ACAS,2016).

1.1 Is this a TUPE transfer - Yes

considering the points above in relation to BBL and Illuminate -

Business transfer? – This could be considered a business transfer under TUPE, part of (majority/maybe all) of Illuminates employees are set to potentially move to BBL.

Service provision change? –

Each point required to be a service provision change is satisfied in this scenario.

- *“An organised grouping of employees”* (ACAS,2016).

There is a group of illuminate employees provided to BBL to meet the service needs.

- ***“Employees should be assigned to the group”*** (ACAS,2016).
- ***“The client should remain the same”*** (ACAS,2016).
 - To satisfy both points above consideration can be made to the time spent at particular works, this was highlighted in the case of *Hunt V Storm Communications and others* (2007) (cited in Lewis and Sargeant,2020,p,201), Hunt was a PR manager and worked approximately 70% of her time for a particular client, ruling of the employment tribunal confirmed this was a transfer. Currently, the 15 Illuminate employees spend 85% at BBL, so this can likely be viewed as their “principal purpose” and once again suggests that the view of an employment tribunal would potentially be in favor of this being a TUPE transfer.
- ***“The activities should not become overly fragmented”*** (ACAS,2016).
- ***“The activities should remain fundamentally the same”*** (ACAS,2016).
 - Going forward the arrangement is that the current Illuminate employee roles will be implemented within the current BBL Electrical Engineer roles, therefore, Illuminate are currently carrying out activities that will fundamentally continue going forward (regulation 5 of the 2014 amendments),(Lewis and Sargeant,2020,p,328), and therefore the works going forward could not be seen as *“overly fragmented”* (ACAS,2016).

1.2 Is this a TUPE transfer - No

The changes to the job role could potentially be something to consider in relation to this situation not being a TUPE transfer. The role is going to change with the add-on of delivering specialist Electrical services along with the current basic Electrical provision. To not be TUPE this change would need to be sufficient enough to justify that the role is not fundamentally the same. Both roles fall within the scope of Electrical works, but it would be for a tribunal to ultimately decide on this (Department for Business Innovation and Skills, 2014).

1.3 Conclusion

In some instances, there could be both a business transfer and service provision change, in light of previous information highlighted (1,1.1), this could be the likely view in this scenario. The reasons why this could be considered a TUPE transfer far out way why it could be considered not, with this in mind this is likely to be considered a TUPE transfer.

2. TUPE transfer legal obligations

To legally complete the TUPE transfer, specific points will need to be addressed by both BBL and Illuminate. The initial consultation will need to take place via the trade unions and inform all 15 affected employees that:

- A transfer is to take place
- Why and when it is to happen
- Implications it may have (legal, social, economic)
- Plans that both the employer and transferee intend to make about the employees (Daniels,2019.p202).

This process will be best delivered with BBL and Illuminate working together to establish a suitable agenda and all communications documented efficiently from start to finish.

To note: Inadequate or lack of consultation can result in compensation awarded to each employee affected up to the amount of 13 weeks' pay, with liability lying with either or both BBL and Illuminate (ACAS,2021f). How serious the failure is could also enable an employee to resign and then claim constructive unfair dismissal (CIPD,2021,c).

2.1 Illuminate obligations

At least 28 days before the transfer Illuminate will need to provide written confirmation, known as Employee liability information (ELI), and due diligence information about the 15 employees (ACAS,2016).

Including:

- Name and age of employees
- The employees' contracts
- Information of collective agreements
- 2-year history of any formal grievances raised and disciplinary records
- Any previous legal actions brought to or that illuminate thinks may be brought in the future.
- Detail of the profit share scheme
- Date and method of pay (Daniels,2019.p203), (Department for Business Innovation and Skills, 2014),(CIPD,2022).

To note: If Illuminate does not provide this information, then BBL could apply to the tribunal for compensation. This is a minimum of £500 (with no cap) for each employees' information either incorrectly or not provided (ACAS,2016).

2.2 BBL obligations

TUPE protects the terms and conditions of the employees transferring, including all statutory and contractual rights, as if the contract was originally made between BBL and the employees (Gov.uk,2022a).

Going forward responsibilities of BBL in relation to the transferring employees will include:

- Any statutory or contractual arrears of pay, such as holiday, sick, redundancy, maternity, or paternity pay.
- Start dates at illuminate will be kept for service continuity
- Providing 35 days annual leave to the transferred employees
- Any previous, ongoing, or future liabilities considered under employment legislation such as discrimination and unfair dismissal.

To note:

- Criminal liability and/or liability to third parties will not transfer. (Department for Business Innovation and Skills, 2014),(CIPD ,2022).
- Consultation should be meaningful and provide a chance for affected employees to consider changes. Any potential alternatives will need to be discussed with FEW Union and transferring employees and agreement made with them before any final decision of change is made (Cabrelli,2016,p720)

Proposed changes – however minor will need to be addressed and highlighted via consultation. (ACAS,2016). In particular, the following points will need to be addressed:

- **Profit share scheme** – This will need to be “*compensated by an equivalent provision or payment*” (ACAS,2016). Depending on the detail of the current share scheme - an alternative provision could be considered as increasing the transferring employees’ hourly rate in line with current BBL employees, as provision does not have to be the same but of a justifiable comparator (Weatherhead, 2019).
- **Pension Scheme** – Current workplace pensions will not transfer over under TUPE but under pension legislation, all eligible transferring employees will need to be auto-enrolled onto a pension scheme. This will need to meet minimum standards, which is currently the annual cost of 3% of salary to BBL for each eligible employee (Gov.uk,2022b). Failure to provide or pay the pension on time can result in a fine from The Pensions Regulator (TPR), (The Pensions Regulator,2022).
- **Job description** – a new job profile will need to be devised and provided to the transferring and existing employees which details the new combined role of providing general and specialist electrical skills. Making changes is limited under TUPE but this is covered under the economic, technical, or organisational (ETO) reasons for change (Department for Business Innovation and Skills,2014). Consideration will need to be made to the cost of training needed for the 15 new employees and the time required to complete. This will indicate if this

is a profitable business move or if it suggests keeping the two roles at this point (CIPD,2022).

To note: If seen reasonable after sighting the contents of the ELI/ due diligence information, then any warranties and indemnities needed should become apparent. For example, an Indemnity could be put in place so that Illuminate would pay compensation if a certain type of liability may arise (CIPD,2021b).

3. Redundancy and selection issues

To note: It is highlighted in the information sent that this is a redundancy situation, before drawing on this conclusion alternative measures should be seriously considered through the consultation process, – this will reduce the risk of potential unfair dismissal claims (Daniels,2019.p191).

Alternatives to redundancy include, but are not exclusive to:

- Voluntary redundancy
 - Recruitment stops
 - Retraining and redeployment
 - Secondment
 - Early retirement
 - Unpaid leave
 - Use of annual leave
 - Reduced hours – part-time or flexible working arrangements
 - Pay cuts/pay freeze
- (Willey et al,2012,p113)

If redundancy is to continue after consideration of alternative methods, then this can be seen as a fair process as this is the result of not needing as many employees due to improved efficiency. The whole process must be fair to migrate any risk towards the organisation (Lewis and Sargeant,2020.p286).

- **“Last in, first out” selection methods**

The use of the “last in, first out” selection method as proposed by IWU poses an unnecessary risk to the organisation.

This method has been determined to be indirectly discriminate against employees, for example, a person’s length of service is likely to be higher as they get older, therefore creating the potential of an age discrimination claim. This option can and is still used, but would need to be reasonably justified, adding this to other reasonable selection criteria would reduce risk and prove to be a fairer process (Cabrelli,2016.p748).

Selection criteria should be fair, objective, based on fact, not opinion, and have realistic measurable outcomes, with the same applied to all within the redundancy pool (ACAS,2022).

ACAS (2022) Suggestions include:

- *“Standard of work or performance*
- *Skills, qualifications, or experience*
- *Attendance record, which must be accurate and not include absences relating to disability, pregnancy, or maternity*
- *Disciplinary record”*

Along with suitable selection criteria, a suitable fair scoring matrix will need to be developed and if possible, the employee’s direct line manager not be used as part of the process to prevent any bias (ACAS,2021d).

Selection criteria will need to be consulted and agreed upon with the union, raising the points mentioned prior about potential risks of using the suggested “first in, first out”, will hopefully encourage IWU to re-consider and enable negotiation that it can be used but alongside other criteria to ensure fairness (Cabrelli,2016.p748).

4. Legally compliant and fair process for redundancies

To avoid future risk to the organisation the redundancy process followed must be fair and reasonable. It is fundamental that the process is well documented from start to finish (all meetings noted, required letters sent, time frames recorded, etc), (Cabrelli,2016).

To note:

- Only employees with 2 or more years’ service at termination date (including any statutory notice period) can put a claim forward for unfair dismissal (Taylor and Wilkinson,2016, p.33).
- Collective consultation is required for over 20 employees and must begin at least 30 days before the first termination (no termination can take place within these 30 days even if consultation is completed), (Trade Union and Labour Relations Act,1992 cited in Daniels,2019.p190).
- The need for collective consultation considers where the employees are based and the management structures (If the employees are not viewed as based at one in site, in principle, they can then be regarded as separate identities and collective consultation may not be needed), (Lewis and Sargeant,2020,p287).
- Failure to collective consult when required possess potential claims, which can be compensated to a maximum of 90 days’ pay per individual claim (Lewis and Sargeant,2020,p288).
- If concluded as collective consultation, form HR1 will need to be submitted to the secretary of state at least 30 days before the redundancy are due to take place. Failure to submit in time is a criminal offense company directors can be personally liable (Daniels,2019,p.190).

- Best practice would be to continue with collective consultation regardless (ACAS,2016).

Key steps for a fair redundancy process:

1. Devise a clear plan and process to follow
2. Initial letter sent to both unions, including:
 - Reasons for potential redundancy
 - 23 electrical engineering jobs effected
 - Proposal for selection criteria
 - Proposal for dismissal process
 - Method of calculating redundancy (if beyond statutory), (ACAS,2014).
3. Consider other options (as noted previously, page 6)
4. Decide on the employee pool of those to potentially be made redundant – from information provided it would be prudent to include all Electrical Engineers.
5. Consider selection criteria to be used (as noted previously, page ?).
6. Hold an initial meeting, with all potentially affected employees (including those on leave – sickness, maternity, etc) and unions encouraging feedback and input from all – this is a time for suitable negotiation and true consideration given to any points raised, (Cabrelli,2016).

Points to be covered (as per Section 188(4) of the Trade Union and Labour Relations Act 1992, cited in Daniels,2019.p191):

- Explanation of the situation
- Other options that are being considered
- 23 jobs effected
- Consultation will take place to confirm the next steps
- Potential selection criteria
- Confirm all information provided in the meeting will be confirmed in writing. (ACAS,2014.p.21)

To note: If any of the proposals change significantly after this meeting then the process will need to start again, by re-issue of the updated initial letter (point 2 above), (Lewis and Sergenat,2020.p288).

7. Once scoring criteria are agreed, scoring of all employees is to be completed.
8. Written confirmation sent to all potential redundant employees confirming:
 - Why redundancy has been chosen
 - The employee's score and how it was reached

- Invite to 1st formal individual consultation meeting
- No final decision will be made until after consultation meetings have been completed
- Employee representatives are welcome

****Allow adequate time between letter and meeting for employees to consider.**

(ACAS,2021,d)

9. 1st formal individual consultation meeting to be held. This is a chance for employees to ask any questions, raise concerns with the process or their scoring outcome and ask questions about their redundancy entitlement. If any points raised need to be followed up these must be actioned before proceeding further (ACAS,2021,d).
10. The 23 employees with the lowest scores are to be sent an invite to 2nd formal individual consultation meeting. Once again, any issues/concerns can be raised and if needed, followed up before proceeding further (ACAS,2021g).
11. After both meetings have been completed, if the outcome is redundancy, a further letter must be sent to invite to an outcome meeting which will need to confirm :
 - Any issues addressed in the previous meetings and outcome
 - The potential outcome of this may be redundancy (ACAS,2021g).
12. Outcome meeting held to confirm:
 - The employee has been selected for redundancy and why
 - No other alternative is available
 - Answer any questions
 - Right to appeal
 - Their redundancy packages (ACAS,2021d).

To note: Under section 135 of the Employment Rights Act 1996 (cited in Willey et al,2012), all employees made redundant with 2 years or over service have the right to statutory redundancy pay. The cost of this will be different for all, it is based on length of service, age and specific calculations found via [Calculate your employee's statutory redundancy pay - GOV.UK](https://www.gov.uk/calculate-redundancy-pay) (www.gov.uk).

13. Confirmation of termination to be sent out in writing confirming:
 - How the decisions were made – providing clear facts not opinion
 - Termination date
 - The right to appeal, how and time frame (Organisation appeal process to be followed)
 - Calculation of redundancy pay
 - breakdown of any holiday pay owed
 - Next steps – working notice/garden leave / PILON (ACAS,2021g).

To note:

- During the notice period, all employees with 2 years or more service have a statutory right to be paid (40% of their weekly pay) to look for/attend training for new employment (this can be reasonably refused), (Gov.uk,2022c).
- If an employee is on maternity leave and identified as part of the redundancy pool then they have a legal right to be automatically offered any available alternative suitable role, which is no less favourable than their current role. Failure to do this will result in unfair dismissal with no requirement of 2 years' service to claim, along with potential maternity/sex discrimination claims (GOV,2019).

5. Options for change to terms and conditions

5.1 Consultation

Holding a fair consultation process can give the opportunity to clearly explain the need for the business change. With the importance of adding the mobility clause to contracts for continued business efficiency and growth going forward. This process can give all the chance to discuss concerns and issues and work together to find a reasonable resolute going forward (ACAS,2014).

- Advantage

This process may change the opposition of employees and keep staff morale and loyalty intact as they have been included in the decision process.

- Disadvantage

Consultation can be a long process and still may not get the desired outcome.

5.2 Fire and re-hire

If the change is not accepted, then BBL could choose to terminate employees' contracts and then have the option to rehire with the new terms and conditions. ("Fire and re-hire"). This would be based on "*some other substantial reason*", which would, in this case, be due to "*business need*" (*Employment Rights Act 1996, S98*, cited in Willey et al,2012)

- Advantage:

BBL can offer a new contract with the added mobility clause.

- Disadvantage:

Employees have the option to accept or not and if not, there would then be potential for breach of contract and unfair dismissal claims (Willey et al,2012).

As long as this is a genuine business need, and all steps are followed in line with the ACAS Code of Practice on Disciplinary and Grievance Procedures

(ACAS,2015) (appropriate consultation, entitled notice periods given)(Daniels,2019,p78) then the likely (but not guaranteed) outcome at an Employment Tribunal could be that the dismissal was fair if BBL went forward with this option (Willey et al,2012). But if at tribunal BBL was unable to demonstrate the aforementioned then the financial risk is high (Taylor and Wilkinson,2016, p.33).

This approach can and most likely will create hostility amongst the workforce when considering the outcome of the recent employee survey. This can damage working relationships, increase absence levels, create a decrease in performance, and gives potential to talented employees seeking alternative employment (ACAS,2021a,c), all of which pose risks and cost to the organisation.

To note: for employees that have TUPE'd there are very strict guidelines about changing terms and conditions. For example, the case of *Taylor v Connex South-eastern Ltd* (2000) (cited in Lewis and Sargeant,2020, page,198) raises caution as two years after TUPE has taken place the employer tried to make a minor change to terms and conditions, the employee refused and subsequently was dismissed, the EAT ruled that this was in direct relation to TUPE and ruled a case of unfair dismissal. To reduce the risk of potential claims, any changes to terms and conditions will need to satisfy that there is an Economic, Technical, or Organisational (ETO) defence for the changes in the workforce (Lewis and Sargeant,2020,p,198). This can include changes to the place of work and must include the daily running of the business.

6. Clause

The employer must ensure that any changes in relation to such a clause are still delivered in a way that is “*compliant with the implied term of mutual trust and confidence*” (Cabrelli,2016). Changing the option of the place of work, in this case, may see employees have to travel several miles further than normal, this could be seen as unreasonable and therefore a breach of “mutual trust and confidence”. This could lead to employees resigning and putting a claim forward for constructive dismissal (Willey et al,2012).

This was confirmed in the case of *United Association for the Protection of Trade Ltd v Kilburn*, (cited in Willey et al,2012). Where the outcome of the tribunal concluded that it would not include substantial change only minor changes under this type of clause.

The current flexibility clause in the contracts highlights that there may be a need for change, which can be a good starting point to highlight during consultations of the new change but in reality, does not give specifics and as mentioned, and to avoid risk should only be used for minor alterations, so does not provide much use in this scenario (Willey et al,2012).

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