

TUPE

These notes provides an overview of the main provisions of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE). It considers the situations where TUPE will apply and addresses the main principles and obligations arising from TUPE, including the automatic transfer principle and obligations to inform and consult.

Background to TUPE

TUPE came into force on 6 April 2006 and replaced the Transfer of Undertakings (Protection of Employment) Regulations 1981 (*S/1981/1794*) (TUPE 1981). It applies to any relevant transfer that took place on or after 6 April 2006.

TUPE implements the Acquired Rights Directive. English courts and employment tribunals are required to give TUPE a purposive construction to give effect to the general purpose of the underlying Directive, which is to safeguard employees' rights on the transfer of a business.

TUPE introduced three concepts into UK employment law:

- The automatic transfer principle: employees transfer to the transferee who inherits all rights, liabilities and obligations in relation to them.
- Protection against dismissal in connection with a TUPE transfer.

- The obligation to inform and consult with representatives of the affected employees.

Changes to TUPE: 2014 amendment regulations

Various changes to TUPE were made throughout 2014, and this note incorporates all of those amendments. The amending legislation came into force on 31 January 2014, subject to transitional and saving provisions.

When does TUPE apply?

TUPE applies to a "relevant transfer", which means either or both of the following:

- A transfer of a business, undertaking or part of a business or undertaking where there is a transfer of an economic entity that retains its identity (a **business transfer**) (regulation 3(1)(a), TUPE). This involves three elements:
 - an economic entity;
 - a transfer of that economic entity; and
 - the economic entity retaining its identity following the transfer.
- A client engaging a contractor to do work on its behalf, reassigning such a contract or bringing the work "in-house" (a **service provision change**) (regulation 3(1)(b), TUPE). This can, therefore, encompass an initial (or first generation) outsourcing, a subsequent (or second generation) outsourcing or an in-sourcing. However, the supply of goods and "one-off buying-in of services" are excluded. The 2014 changes included a minor amendment, making it clear that the activities carried on after a

change in service provider must be "fundamentally or essentially the same" as those carried on before it.

Share sales

TUPE does not apply to a transfer of shares, but it would apply to an asset transfer carried out as a precursor to a share sale or a transfer of the business or part of the business to the holding company following a share transfer.

Automatic transfer principle

Where there is a relevant transfer:

- The contracts of employment of those employees employed by the transferor and "assigned to the organised grouping of resources or employees that is subject to the relevant transfer" automatically transfer to the transferee on their existing terms, with the exception of old age, invalidity and survivors' benefits under occupational pension schemes (regulation 4(1), *TUPE*). This principle applies to all employees who were employed in the grouping immediately before the transfer, or who would have been so employed if they had not been dismissed by reason of the transfer, unless that reason was an economic technical or organisational reason (ETO reason) (*regulation 4(3), TUPE*).
- The transferee effectively steps into the transferor's shoes with regard to the transferring employees. All of the transferor's rights, powers, duties and liabilities under or in connection with the transferring employees' contracts pass to the transferee and any acts or omissions of

the transferor before the transfer are treated as having been done by the transferee (*regulation 4(2), TUPE*).

- Employees who object to the transfer do not become employees of the transferee. Instead, their contracts of employment terminate by operation of law on the transfer date (*regulation 4(7), TUPE*). There is no dismissal.

Changing terms of employment

The transferee takes on the transferring employees on their existing terms of employment, and can only make changes to their terms in limited circumstances.

Changes to terms of employment will be void if the sole or principal reason for the change is the transfer itself, unless either:

- The reason for the variation is an ETO reason.
- The reason for the variation is the transfer, but the terms of the contract permit the employer to make such a variation.

(Regulation 4 (4)-4(5), *TUPE*.)

Protection against dismissal

TUPE provides enhanced protection against dismissal over and above general unfair dismissal law for employees with (at least) the qualifying period of service.

Dismissals will be automatically unfair if the sole or principal reason for the dismissal is the transfer itself. If, however, the reason is an ETO reason, then they will instead be potentially unfair (Regulation 7 (1) *TUPE*).

Resignations in response to a repudiatory breach of contract or to substantial changes in working conditions to the employee's material detriment are treated as deemed dismissals to which the enhanced protection against dismissal applies (regulation 4 (9) and 4 (11) , *TUPE*).

Obligations to inform and consult

Both the transferor and the transferee must inform and (if appropriate) consult with recognised trade unions or elected employee representatives (if there is no recognised union) in relation to any of their own employees who may be affected by the transfer or any measures taken in connection with it. Certain information must be provided to the representatives long enough before the transfer to enable the transferor to consult with them about it. Although there will be a duty to inform on every TUPE transfer, the duty to consult only arises where an employer envisages taking measures in respect of

affected employees (regulation 13, *TUPE*). Since 31 July 2014, the 2014 amendment regulations allow micro-businesses with ten or fewer employees to inform and consult affected employees directly in certain circumstances.

A failure to comply with these obligations exposes the parties liable to pay compensation equivalent to up to 13 weeks' uncapped pay. The transferor and transferee may, in certain circumstances, be held to be jointly and severally liable for this (regulation 15, *TUPE*). Affected employees of a transferor are only able to obtain compensation from the transferee where the transferor makes the transferee a party to the proceedings alleging the transferee's failure under regulation 13(4).

The 2014 amendment regulations enabled the transferee to elect to consult representatives of affected employees, including those transferring, before the transfer, provided that it notifies the transferor in writing and the transferor agrees.

The obligation to provide "employee liability information"

The transferor must provide the transferee with certain information about the transferring employees (the "employee liability information") not less than 28 days before the relevant transfer takes place. If the transferor fails to provide this information, then the transferee has a remedy under regulation 11 and regulation 12 of *TUPE*.

Insolvent businesses

Some of the fundamental TUPE employment protections are relaxed where the transferor is insolvent. This is designed to facilitate the rescue of failing businesses. The extent of these modifications depends on the nature of the insolvency proceedings to which the transferor is subject. In general, more significant employment protections are removed where the transferor is subject to terminal insolvency proceedings which aim to liquidate the transferor's assets.

What happens if TUPE doesn't apply?

If a business transfers from one employer to another but TUPE doesn't apply then:

- The employee's consent is required for their employment to transfer.
- If the employee agrees to be transferred, and the new owner of the business agrees to take them on, then their existing period of continuous employment will be preserved (section 218, *Employment Rights Act 1996*).

Key changes to TUPE made by the 2014 amendment regulations

The main changes to TUPE as a result of the 2014 amendment regulations (and which mostly came into effect on 31 January 2014) are:

- The rules on service provision changes will remain, but the legislation will clarify that for there to be a TUPE service provision change, the activities carried on after the change in service provision must be "fundamentally the same as the activities carried out by the person who has ceased to carry them out."
- The requirement to provide employee liability information is retained but from 1 May 2014 the information has to be given 28 days before the transfer, rather than the previous 14 days.
- Changes in the location of the workforce following a transfer will be expressly included within the scope of an ETO reason, thereby preventing genuine place of work redundancies from being automatically unfair.
- Since 31 July 2014, micro-businesses are allowed to inform and consult affected employees directly when there is no recognised independent union, nor any existing appropriate representatives.