

Introduction

The UK legislation known as “TUPE” ((Transfer of Undertakings (Protection of Employment) Regulations 2006) provides employment rights to employees when their employer changes as result of a transfer of an undertaking.

They implement the European Community Acquired Rights Directive (71/187/EEC, as amended by directive 98/50 EC and consolidated in 2001/23/EC). Therefore it is **not just** the UK that has to implement the Acquired Rights Directive (“ARD”). **ALL** European countries have to introduce legislation to implement ARD.

When Does TUPE Apply?

The law on whether TUPE applies is complex but, in broad terms, TUPE applies to “relevant transfers”, which will occur when:

A business undertaking or part of one is transferred from one employer to another as a going concern from one employer to another as a going concern (known as a “**business transfer**”).

A client engages a contractor to do work on its behalf or re-assigns such a contract – including bringing the work “in house” (known as a “**service provision change**”).

To qualify as a “**business transfer**”, the identity of the employer must change. Therefore, subject to very limited circumstances, TUPE does not apply to transfers by **share take-over** because, when a company’s shares are sold to new shareholders, there is not transfer of a business or undertaking i.e the same company continues to be the employer. Therefore TUPE **will normally** apply to a **transfer of assets**.

“**Service provision changes**” concern relationships between contractors and the clients who hire their services. Examples include contracts to provide such labour intensive services as IT support, office cleaning, workplace catering, security guarding, and refuse collection.

Issues for Transferee to Consider When Handling a TUPE Transfer

The impact of TUPE in the UK on business sales, business purchases, contracting out, contracting back in and transitions of all types, is massively significant, creating potential liabilities which are often hidden from a transferee purchaser or a transferee employer.

These may amount to vast sums which could never have been envisaged when the transaction or transfer was first being considered.

The following is a summary of the types of practical issues that purchasing businesses must consider before transfer:

1. Have a Plan in Place!

An employer must look at such matters as:

- What is it that the exercise hopes to achieve?
- What is the timescale over which this exercise is to be conducted?
- What is the timescale for the various steps which will have to be taken within the overall timescale?
- What are the employer’s legal obligations and duties within this process?
- What contractual terms are in effect with the employees who are affected by the exercise?
- Who are the Management Personnel who will deal with the process and do they need training?
- What liabilities will the employer have if it gets it wrong?
- Does the exercise create a transfer under TUPE?
- Are there equal pay issues which will arise?
- What are the duties for giving information and consulting?
- Do we need external advice and assistance?

2. Information Checklist

Information required includes (but not limited to):

Details of Employees (including those on maternity leave or long-term sick).

The purpose of this is to work out who may have unfair dismissal/redundancy rights; to identify any illegal workers; to identify any latent Equality Act compliance problems/claims; to work out total potential severance cost; to decide whether harmonisation of terms will be necessary; to decide who will be transferred and who will be opting out.

Details of agency workers used by the Transferor

The information should include:

- The number of agency workers working temporarily for and under the supervision and direction of the transferor.
- The parts of the Transferor’s undertaking in which those agency workers are working.
- The type of work those agency workers are carrying out.

Disclaimer:

This note does not contain a full statement of the law and it does not constitute legal advice. Please seek legal advice if you have any questions about the information set out above. © Oury Clark 2018

Employment - Handling a TUPE Transfer (2) Guide for Transferee Purchasers/Transferee Employers

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Copies of Employment Documents (including Directors or Senior Executives Service Agreements and benefits/Employment Contracts/Benefits Schemes/Trade Union Agreements/ Employment Policies and Procedures).

Purpose to check for any defects/omissions, flexibility in terms of job, place of work, hours of work, restrictive covenants, any changes required, and to understand extent of workforce policies in place.

Details of Current Litigation/Potential Litigation

The purpose of this is to understand the extent of potential costs/liabilities post transfer. The due diligence exercise is a crucial one. On transfer the acquirer takes on **all** liabilities associated with the assigned employees and therefore it is important that the business is fully aware of what rights and obligations transfer.

3. Know whether Employees are “assigned” and should transfer to you

The acquiring business needs to understand which employees are “assigned” and will transfer over to them.

Please note “assigned” cannot be established by reference to the percentage of the time an employee is engaged in working in the undertaking or part of the undertaking being transferred. Ultimately, it is essentially a question of fact for the Tribunal.

4. Don’t assume you can change employees’ terms and conditions

It is common for employers to want to change contractual terms following a transfer in order to harmonise transferring employees terms with those of existing employees.

However, Regulation 4 of TUPE provides that any variation to a contract of employment would be **void** if the sole or principal reason for it is the transfer

For changes to contractual terms to be lawful:

- The change must be unrelated to the transfer; or
- The sole or the principal reason for the variation is an “economic, technical or organisation reason entailing changes to the workforce (including changes to workplace location) and the employee must agree to the variation; or
- The terms of the contract permit the employer to make such a variation; or
- The transfer is subject to “relevant insolvency proceedings”.

This is a notoriously tricky area of the law with this and other pitfalls to avoid and therefore employers are advised to seek appropriate legal advice if they are considering such a project.

5. Don’t forget to inform and consult

Under TUPE an employer must, prior to transfer, **inform** employees and/or their representatives of any measures it envisages taking in connection with the transfer (or if it envisages that no measures will be taken, inform them of this) and to **consult** with the employees and/or their representatives with a view to seeking their agreement to any intended measures.

Measures could include any action, step or arrangement done by the transferor or the transferee over and above what necessarily occurs as a consequence of the transfer itself. For example a change in payment date could constitute a measure.

Failure to comply with the application to **inform** and **consult** could result in an award of compensation payable to the relevant employees up to 13 weeks’ gross pay for each employee. There is no limit on the amount of a week’s pay.