MACFARLANES

THE TRANSFER OF UNDERTAKINGS (PROTECTION OF EMPLOYMENT) REGULATIONS 2006

EMPLOYMENT

BACKGROUND

What is TUPE?
TUPE stands for the Transfer of Undertakings (Protection of Employment) Regulations. TUPE has been amended, with effect from 31 January 2014. Changes made by these 2014 amendment regulations are noted below.

What is the purpose of TUPE?
TUPE is designed to protect employees' rights on the transfer of businesses and operates to transfer automatically the employment contracts of those employees who are assigned to a transferring business and who would otherwise lose their jobs as a result of the transfer.

The principal effects of TUPE are:

- the automatic transfer of employment;
- a requirement to inform and consult with "affected" employees;
- a presumption of unfairness if employees are dismissed for a reason connected with the transfer; and
- changes to terms and conditions are in most cases void and unenforceable.

When does TUPE apply?
A TUPE transfer can be either a "transfer of an undertaking" and/or a "service provision change":

Key features of a "transfer of an undertaking"
The undertaking or business (or part):

- is an "economic entity";
- is situated in the United Kingdom; and
- retains its identity following the transfer.

Key features of a "service provision change"
A service provision change is a situation where:

- an organised group of employees carries out certain activities for a client as its principal purpose;
- the group is situated in Great Britain;
- the activities cease to be carried out by one person and are carried out instead by another on behalf of the client.

Subject to certain exceptions, insourcing, outsourcing or change of third party service providers can all be TUPE transfers.

Are small transfers exempt?
No, TUPE can apply even if only one employee transfers.

So, when does TUPE not apply?

- TUPE does not apply to a sale of shares in a company;
- TUPE does not apply to a "bare asset" sale i.e. a sale of assets only with no underlying business transfer;
- TUPE does not apply to contracts for the provision of services relating to the supply of goods;
- TUPE does not apply to contracts for the provision of services relating to a single event or task of short term duration.

Are overseas transfers exempt?
Broadly speaking, transfers from overseas locations to the UK are exempt, whereas transfers to an overseas location from the UK are not. TUPE specifies that the undertaking or organised group of employees must be based in the United Kingdom or Great Britain before the transfer but does not limit its application by reference to the new location after the transfer.

Businesses situated in countries that are Member States of the European Union may, however, have local legislation that is similar to TUPE, and separate advice should be sought in these circumstances.

TRANSFERRING EMPLOYEES

Who transfers?
All employees who are "assigned" to the relevant business or activity transfer. TUPE does not define "assignment" and it would be determined by considering all the relevant circumstances, including:

- employment terms – does the contract link the employee to the transferring undertaking?
- duties performed by the employee;
- the amount of working time devoted by the employee to the transferring business; and
- to whom the employee reports.

Who does not transfer?
Employees do not transfer if their employment with the transferor will continue notwithstanding the transfer. Workers who are not employees do not transfer.

Can employees elect not to transfer?
Yes. Employees cannot be forced to transfer their employment. Employees can "opt out" of the transfer but this is treated as a resignation which brings the employment to an immediate end and is not a dismissal. Neither transferor nor transferee has any liability to the employee who takes this course of action thus it rarely serves an employee to opt out (unless it is a key employee wishing to escape the notice provisions of his contract and, depending how they are drafted, restrictive covenants).

Additionally, where the transfer would involve a substantial change in working conditions to the employee's material detriment, the employee may treat the contract as having been terminated or, if the employment contract has been breached in a material way, an employee may resign and claim constructive dismissal. Both of these are treated as dismissals and accordingly may give rise to liabilities for the employer.

Can the transferor "cherry pick" employees it would like to keep?
In principle, TUPE transfers all those employees assigned to the business or service in question. However, TUPE only operates to transfer those employees whose employment would otherwise be terminated by the transfer. If the transferor wanted to retain key employees, it could reassign them to another part of the business before the transfer. If the reassignment was outside of the scope of the relevant employee's contract of employment, the employee's consent would be required.

Can the transferee select the employees it wants?
No. If the transferor does not redeploy them, TUPE operates to transfer assigned employees automatically.

Dismissing employees
Any dismissal made by reason of the transfer or in connection with it will be automatically unfair unless:

- the reason for the dismissal is an "ETO reason"; and
- the employer follows a fair process.

What is an "ETO reason"?
Where a dismissal is connected to the transfer, the only defence to a charge of automatically unfair dismissal is that the reason for the dismissal was an "economic, technical or organisational reason entailing changes in the workforce". Under the 2014 amendments, provided an ETO reason applies there is no need to decide whether the dismissals have been caused by the transfer or by a reason connected with it.

Changes in the workforce must either be in number or function. Genuine redundancies are usually ETO reasons.

Under the 2014 amendments, dismissals caused by a relocation of the business post-transfer will also be for an ETO reason.

Who should implement the redundancies?
Usually, it is the transferee which has a need for redundancies and in those circumstances the ETO reason is said to be the transferee's reason. If the transferor is persuaded to implement redundancies on behalf of the transferee before the transfer takes place, it does so without an ETO reason of its own. Arguably, the transferor is not permitted to rely on the transferee's reason and would be at risk of claims that the dismissals were automatically unfair.

Can TUPE be bypassed?
No. Any attempt to contract out of TUPE is void. However, where an employee has been unfairly dismissed because of TUPE, the claim for unfair dismissal may be settled by way of a settlement agreement.

TERMS AND CONDITIONS OF EMPLOYMENT

"TUPE protected" terms
Save in respect of certain occupational pension rights (see below), the transferring employees transfer on the same terms and conditions of employment as they enjoyed before the transfer. These terms are said to be "TUPE protected". Any attempt to vary them for a reason connected with the transfer will be void and unenforceable, even if the employee agrees to the change. Improvements to terms are permitted.

Changes may be made for a reason connected to the transfer if it is an ETO reason. Note however, that in order to be an ETO reason, there must also be a requirement for a change in number or function.

When would a change to terms no longer be connected to the transfer?
Time passing will inevitably reduce the likelihood of a link between the need for change and the transfer. However, mere passage of time without any intervening event to break the chain of causation does not preclude a connection with the transfer.

Can the new employer harmonise terms?
Generally speaking, no. Harmonisation is considered to be connected to the transfer and without an ETO reason the new terms are void and unenforceable. The requirement for a change in number or function means it is difficult to demonstrate an ETO reason exists.

How can terms be changed?
Since any variation of employment terms in connection with a transfer would be void, one way to minimise (though not remove) the risk can be to effect a change by terminating the employee's employment and offering replacement employment on the new terms and conditions. This type of termination is automatically unfair because it will inevitably be connected with the transfer, however the unfair dismissal claim can be settled by way of a settlement agreement.

TRANSFERRING RIGHTS AND LIABILITIES

What transfers?
All contractual rights and liabilities arising under the contract of employment or in connection with it transfer.

Accordingly, the transferee inherits virtually all the previous employer's obligations owed to its employees including:

- accrued employment liabilities and costs;
- to the extent that any dismissal was connected to the transfer, pre-transfer dismissal claims;
- continuity of employment;
- personal injury liability (as well as the benefit of the transferor's insurance policy in respect of transferring employees); and
- collective agreements and trade union recognition.

What does not transfer?
Very few liabilities do not transfer:

- criminal liabilities;
- liabilities for pre-transfer dismissals which are unconnected with the transfer; and
- rights and liabilities relating to provisions of occupational pension schemes which relate to benefits for old age, invalidity or survivors.

Pensions
Occupational pension rights do not transfer, except rights which do not relate to benefits for old age, invalidity or survivors benefits. So, the right to be a member of an occupational scheme does not transfer but early retirement rights and enhanced redundancy entitlements which arise as a result of membership of such a scheme do transfer.

Separate provision is made in respect of pension entitlements in the Transfer of Employment (Pension Protection) Regulations 2005 which impose obligations on the transferee to provide minimum levels of pension provision.

These obligations only arise if the transferor offered either a defined benefit scheme or a contributory money purchase scheme. The transferee may elect to provide either a defined benefit scheme (which must meet certain conditions) or a money purchase occupational scheme (which can be a stakeholder scheme). If it elects to provide the latter, it must make matching contributions up to six per cent., irrespective of the level of contributions made by the previous employer (although subject to any contractual entitlement to higher contributions).

Share options or profit sharing arrangements
Usually, share option entitlements will be governed by the rules of the scheme. However, entitlements to share options which are either contractual or which arise in connection with the employment are capable of transferring under TUPE. In those circumstances, the Employment Tribunals have held that the entitlement of the transferred employees is to participate in a substantially equivalent scheme but one which is free of unjust, absurd or impossible features.

Restrictive covenants
Covenants are contractual terms and as such the benefit transfers to the transferee with the employment contract. However the question arises whether the scope of the covenant is limited to the business of the transferor or extended to include the wider business of the transferee? Where an employee was dismissed shortly after the transfer, the Employment Tribunals have held that the scope of the covenant is limited to the transferring business.

However, if an employee opts out of a transfer, the contract comes to an end and arguably the benefit of the covenants does not transfer to the transferee. Depending how the covenants are drafted, this could be an opportunity for key employees to escape the covenants.

INFORMING AND CONSULTING

Who has obligations to inform?
Employers whose employees may be affected by the transfer are required to notify elected employee representatives of the following matters:

- the fact of the transfer;
- the reasons for it;
- when it will take place;
- any implications for the employees; and
- any "measures" envisaged by either the transferee or the transferor.

Note that for these purposes "affected" employees may not only be the transferring employees and accordingly this obligation may fall to both the transferor and the transferee in respect of their own employees.

The transferee has an additional obligation to notify the transferor if it anticipates taking any "measures".

What are "measures"?
"Measures" is a term widely construed and covers any step or action affecting the employees. Typical measures would be:

- changes to pension arrangements;
- changes to benefits providers;
- structural or functional changes;
- relocation; or
- redundancies.

When is there an obligation to consult as well as inform?
An employer is required to consult elected representatives in relation to any measures that it anticipates taking itself. Technically therefore, there is no obligation for a transferor who does not anticipate taking any measures itself to consult in relation to the transferee's measures. However, usually in those circumstances a transferor will hold a period of consultation.

How long does consultation last?

- The obligation is to consult before the transfer takes place i.e. before "completion" of the transfer.
- The employer is required to consult "with a view to reaching agreement".
- Unhelpfully, TUPE does not set out a precise timetable for consultation. It simply says that the consultation must happen pre-transfer and "long enough before the transfer to enable the employer to consult".
- Unlike the collective redundancy consultation regime, there is no minimum 30 or 90 day period for consultation.
- In practice, the length of consultation will depend on the size of the workforce and the extent of the "measures" proposed. On average, it is rare to be able to complete a consultation exercise in anything less than two weeks.
- The wish to preserve confidentiality is not a valid excuse for failing to consult.
- In practice, employers will sometimes sign a binding legal agreement for the transfer of the business and then consult with the employee representatives in the period before legal completion of the signed agreement.

Do employee representatives have the right to veto the transfer?

- No. The obligation to consult only relates to the "measures" proposed by the employer. Strictly, there is no obligation to consult about the sale itself or right on the part of the representatives to veto it.
- The employer is, however, obliged to consider any representations made by the representatives and to reply stating any reasons for objecting.

Can the employer inform/consult with the employees themselves instead of their elected representatives?

- Strictly speaking, this is would be in breach of TUPE, since the regulations require the election of employee representatives in the case of every TUPE transfer.
- This would apply, for example, even when there are no "measures" and so no consultation obligation.
- In practice, some employers do decide not to elect representatives and to risk the possibility of claims e.g. where there is only an obligation to inform, or where small numbers of employees are involved.

- Under the 2014 amendments, micro-business (those with 10 or fewer employees) will be permitted to consult directly with employees, with effect from 31 July 2014.

What if employees refuse or decline to elect representatives?
If the employer has invited employees to elect representatives, has given them reasonable time to do so, and they fail to elect, the employer is then only obliged to provide each employee with the written particulars referred to above.

What is the remedy for failure to inform and/or consult?
Failure to comply with the information and consultation obligations gives rise to a liability for "protective awards" of a maximum of 13 weeks' pay per employee. These awards are often made by Employment Tribunals on a punitive basis and the starting point for the Employment Tribunals may well be that the maximum should be awarded, although employers can expect some credit for efforts to consult that fall short of full compliance.

Who is liable?
Even though the primary responsibility for informing and consulting with the employees usually lies with the transferor, liability for any failure by the transferor to inform and/or consult is shared between the transferor and the transferee on a joint and several basis. This sharing of liability was a new concept introduced under the 2006 Regulations.

EMPLOYEE LIABILITY INFORMATION

Disclosure obligations
The transferor is under a separate obligation to disclose to the transferee "employee liability information" in respect of the transferring employees at least fourteen days before the transfer. The information must be accurate as at a date not more than 14 days before it is provided. From 1 May 2014, that period will be extended to 28 days.

What is employee liability information?
Employee liability information includes:

- the identity and age of the employees;
- the employees' basic contractual terms;
- details of any disciplinary or grievance proceedings in the last two years;
- information regarding any actual or potential claims against the transferor in the last two years; and
- details of any collective agreement which applies to the employees.

What is the remedy for failure to disclose?
Transferees who have not received full disclosure of employee liability information can bring a claim against the transferor in the Employment Tribunals and are able to claim compensation of a minimum of £500 per employee.

IN PRACTICE

In documenting a transfer, the parties usually agree a series of indemnities to reallocate liability. At its least the commercial agreement will usually be for the transferor to indemnify the transferee in respect of the period up to completion (including any failure by the transferor to comply with its obligations to inform and consult the employees) and vice versa for the period following completion.

CONTACT DETAILS
If you would like further information or specific advice please contact

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