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TUPE
Employee protection on transfers

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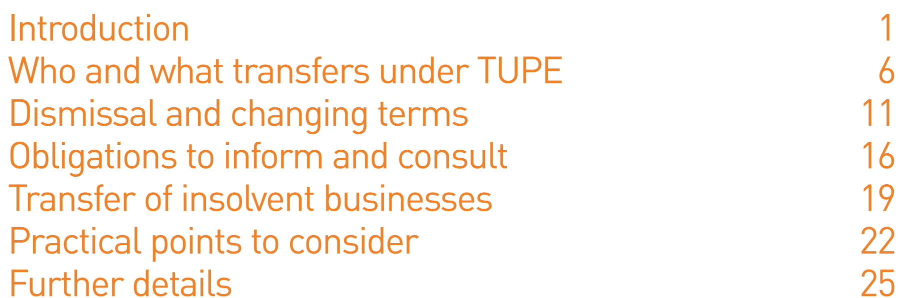

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The lawyers in Lewis Silkin's Employment and Incentives Department are experienced in providing advice and services on all aspects of employment law, business immigration and incentives.

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Introduction

The law governing the employment aspects of mergers, acquisitions and outsourcings is known as 'TUPE' – generally pronounced 'chew pea' – standing for the Transfer of Undertakings (Protection of Employment) Regulations. The original Regulations date back to 1981, but important changes were incorporated in the current version of TUPE which came into force in April 2006.

The purpose of TUPE is to protect employees when the business in which they work changes hands. It works by transferring staff and liabilities from the old contractor to the new contractor, or from the old owner of the business to the new owner. The employees affected (with some exceptions) cannot lawfully be sacked but rather automatically continue in their jobs with their existing terms and conditions and their continuity of service preserved intact. It is as if the new employer has always employed the people it has inherited.

TUPE also requires the old employer to give the new employer information about the staff transferring, their contracts and any associated liabilities.

In addition, staff representatives must be informed, and normally consulted, over the implications of the transfer. If there is no recognised trade union or works council, an ad hoc elected group must be formed for this purpose.

This guide is designed to provide a practical overview of when and how TUPE applies. If you would like further advice or assistance, please contact us at: tupe@lewissilkin.com.

When does TUPE apply?

TUPE applies if either there is:

→ a service provision change; or
→ the transfer of an operation or part of an operation which retains its identity.

These two circumstances are not mutually exclusive. Most service provision changes will also be the transfer of an operation or part.

Service provision changes
A service provision change occurs when activities are:

→ contracted out for the first time;
→ moved from the incumbent contractor to a new contractor; or
→ brought back 'in house' by the business.

For the rules on service provision changes to apply, before the change there must have been an employee or an organised grouping of employees with the principal purpose of carrying on the activities.

Example
A group of cleaners from Sparkle Ltd works at the offices of an insurance firm every morning. When the contract expires, the firm appoints Polish Ltd to do the work. This is a service provision change, resulting in the staff transferring directly from Sparkle to Polish.

Example
A travel agency carries out bookings for several clients but without dedicating any of its staff to particular accounts. One of the agency's main clients, Fickle Ltd, decides to switch to a different travel operator. This will not be a service provision change because there was no organised grouping of employees whose purpose was to carry out the activity for Fickle.

There are some exceptions to the concept of service provision change. For example, a 'one-off' buying-in of services to fulfil a short-term need will not normally be covered.

Example
Contrast the hiring of security staff to protect athletes during the 2012 Olympic Games with a contract for the provision of security advice to the event organisers over a period of several years running up to the Games. The first example would be a short-term buying-in of services and so excluded from TUPE, whereas the second example runs for a significantly longer period and would be covered.

Activities mainly related to the supply of goods rather than services are also excluded – such as where a business purchases components for machinery it is producing, or buys sandwiches for re-sale in its canteen. Here, though, the alternative test of whether TUPE applies would still need to be considered (see below).

Transfer of an operation or part
This occurs most clearly where there is a sale of a business. A business typically comprises assets such as premises, equipment, customers, staff and goodwill. If those are transferred and the business is continued, TUPE will normally be deemed to apply.

Although the sale of a business is a transfer, the concept is wider than that. It covers activities that may be central (e.g. a hardware manufacturer selling its plant) or merely ancillary (e.g. cleaning the manufacturer's plant).

In determining whether TUPE applies to a particular situation by reason of the transfer of an operation or part, there are two stages:

→ identify the operation and what it comprises; and then
→ consider whether it has transferred with its identity retained.

The requirement that the operation retains its identity does not mean that things have to continue exactly as they did before. A fairly broad approach is taken, the relevant factors including:

→ whether tangible assets have been transferred;
→ whether intangible assets have gone across (e.g. intellectual property, goodwill);
→ whether the majority of employees/key staff are retained;
→ whether customers are transferred;
→ the similarity between the activities before and after the transfer; and
→ the duration of any gap in the performance of such activities.

None of these factors is decisive and an overall assessment is made. But in general, if the activities are the same, the customers are the same and staff are still required, even if not the same staff, that will often be enough for there to be retention of identity.

In assessing every case, all the factors set out above are relevant, but often a different emphasis is placed on each factor according to the nature of the business.

Example
A manufacturer and supplier of vehicle parts contracts out the production of braking gear to another company. This part of the business is heavily reliant on plant and machinery, so the extent to which assets and equipment are transferred under the outsourcing deal will be very relevant.

Other businesses' main asset is their staff and they have few non-human assets (for example, an advertising business or a cleaning contractor). Accordingly, whether the staff transfer is of prime relevance (rather than, for example, whether the same buckets and mops are used).

As a general rule, for there to be a transfer, there must be some organisational coherence to the business or activity being carried out by the staff grouping.

Example
In a warehousing and distribution operation, the warehousing would have organisational coherence. Staff would say "I work in the warehouse".
In contrast, say a number of employees are recruited on short-term contracts, but sprinkled around a business performing different roles. In that scenario, it is very unlikely that the group of short-term employees would be regarded as being allied to an organisationally coherent part of the business – in which case, TUPE would not apply to them.

The rules outlined above summarise the legal tests for TUPE applying. As a rule of thumb, TUPE is likely to apply if an employer stops carrying on an activity on which an employee spends most of his or her time and the activity is continued by someone else so that, in retrospect, the employee is able to point to another individual and say "You're doing my job". Although not always a reliable test, this shorthand approach will identify most TUPE transfers.

Mergers and acquisitions
The merger of two organisations or the takeover of one company by another may involve a TUPE transfer. The key point here is that share sales are not covered by TUPE: the employer itself must change (as opposed to a change in the composition of its ownership) in order for TUPE to apply.

Example
Expansion Ltd purchases the share capital of Vulnerable Ltd, but runs the two companies separately. TUPE does not apply because the identity of the employer is unchanged. The employees of Vulnerable continue with the same employer (Vulnerable), albeit that it has a different owner, and with the same rights as before. But they have no special protection against dismissal or information and consultation rights, for example, as they would if TUPE applied.

Example
ABC plc completes a share takeover of X Ltd and then merges its operation with Y Ltd, another company in the group. TUPE applies to the transfer of a business from one subsidiary to another within the same corporate group, so the second transaction is covered.

Changes in partnerships
There are many different situations in which TUPE might apply to transactions involving professional partnerships.

Example
Two law firms, Smith & Partners and Jones & Partners, decide to merge their assets and combine their clients to create a bigger law firm. The partners from both firms sign a new partnership deed to become Jonesmith. TUPE is likely to apply to the transfers of Smith & Partners and Jones & Partners to Jonesmith and the employees of each firm will be protected.

Example
An accountancy firm decides to operate in future as a limited liability partnership (LLP). TUPE will apply to the dissolution of the existing partnership and the transfer of its business to the LLP.

Example
An accountancy firm has a department specialising in offshore tax advice, comprising two partners and three employees. The partners decide to leave the firm, set up their own business and take their clients with them. TUPE is likely to apply to the transfer of the offshore department to the newly created partnership. Accordingly, the two partners must take the three members of staff with them too.

Can we avoid TUPE?

It is difficult to take steps to prevent the application of TUPE and not normally a useful exercise. Businesses cannot decide between themselves that they will not apply TUPE. If employees argue for its application, courts and tribunals will look behind obvious avoidance attempts, such as deliberately not taking on staff or assets used in the old operation.

There are, however, some circumstances in which TUPE applies in theory but it does not suit anyone (including the employees) to apply it.

Example

An advertising agency loses an account to another agency. TUPE is likely to apply if there are employees dedicated to the account. But the agency losing the account may not want to lose its staff, the agency winning the account may not want to take on staff and the staff themselves may want to stay with their existing employer or take a redundancy package. Also, the client has probably changed agencies for a reason and is unlikely to want all (or perhaps any) of the same staff working for it at the new agency.

In such cases it may be possible to work within TUPE to avoid most of its implications.

Cross-border transfers

There is some uncertainty surrounding the application of TUPE to transfers into or out of the UK. TUPE does not apply to a transfer *into* the UK, although the country in which the old operations were based may apply similar legislation (especially if that country is also an EU member state).

As regards the transfer of an undertaking *out of* the UK (i.e. 'off-shoring'), TUPE may apply where the new employer is located abroad – whether inside or outside of the European Union.

In practice, employees would invariably not wish to transfer abroad and would probably not envisage making claims against the overseas contractor. Indeed, they would most likely prefer it if TUPE did not apply so as to ensure they received a redundancy payment from their old employer. However, given the uncertain legal position, it would be advisable for the parties to a cross-border transfer to negotiate suitable indemnities and take the other precautions we advise should be observed when TUPE applies (see pages 22 to 24).

Example

New Horizons Ltd, a company in the UK, decides to off-shore its IT support function to India. Assuming TUPE applies, the contractor should technically offer the jobs in India to New Horizons' in-house IT staff – although they are unlikely to want to relocate to India. The most likely practical outcome is that New Horizons will make the necessary redundancies, perhaps having negotiated a contribution from the contractor in the off-shoring agreement.

Who and what transfers under TUPE

This section considers which categories of staff fall within the scope of TUPE. We then go on to look at how the TUPE principle of automatic transfer applies to such employees and the rights and obligations in connection with their employment contracts that are protected.

Who transfers

TUPE applies only to employees, including those on maternity or sick leave. It does not cover self-employed persons such as, for example, freelancers and subcontractors. Part-time and temporary staff will be covered, so long as they satisfy the test of being an 'employee'.

Temps supplied by an employment agency are unlikely to be protected by TUPE, although in rare situations tribunals might be prepared to imply a direct employment relationship between an agency worker and the 'end-user' company, in which case TUPE would apply to them.

TUPE does not in principle cover employees whose employer is a different group company from that which owns the operation to be transferred – i.e. employees seconded from one group company to another. However, tribunals increasingly view such arrangements with suspicion and may find a device to transfer such secondees under TUPE.

The assignment test
It is only employees who are 'assigned' to the relevant organised grouping of resources or employees who transfer to the new employer. Assignment on a temporary basis is insufficient. The question of whether an employee is so assigned turns on the particular facts. Relevant factors include:

- the proportion of time the employee spends on the part of the operation/activities transferring as compared to other parts of the business;
- the amount of value given to each part by the employee;
- the employee's job description, i.e. the terms of the contract showing what the employee could be required to do; and
- how the costs to the employer of the employee's services are allocated between the different activities of the employer.

Essentially, this boils down to asking "does the employee belong to the part of the employer being sold or to the activities being outsourced?" As such, the percentage of time an employee spends on the part of an employer's operation or devoted to the activities transferring is important but not always the determining factor. There have been cases in which employees have been found not to be assigned to the operation or activity transferring, despite devoting the majority of their time to it.

Example

The chief executive of a group of ten businesses spends 80% of his time working on one of the businesses which is being sold. A tribunal may well not regard him as being assigned to that business as he still 'belongs' to the group.

Employment at time of transfer

TUPE applies to those who are employed in the relevant operation (or part) 'immediately before the transfer' – that is, at the time of the transfer. However, employees may also be protected if they are dismissed shortly before the transfer takes place.

This is because TUPE also applies to staff who *would* have been employed at the time of the transfer had they not been dismissed beforehand for a reason related to the transfer. Whilst such dismissals are effective, they would be automatically unfair and liability would pass to the new employer under TUPE.

Contracts that 'would otherwise terminate'

Another provision in TUPE limits its scope to staff whose contracts of employment 'would otherwise be terminated by the transfer'. These words may give some leeway to employers who wish to prevent certain employees from transferring under TUPE by re-directing them to work in a part of the business they are retaining. Arguably, if such employees are moved out of the operation that is transferring, their contracts would not otherwise be terminated by the transfer.

There are several potential difficulties with this approach. First, we have noted that tribunals tend to be suspicious about the use of secondment arrangements to avoid the application of TUPE: the same probably goes for reassignments. Secondly, an employer using this device would need to have a contractual right to relocate the employees or get them to agree to it in advance of the transfer. Thirdly, such employees might claim that the relocation amounted to a substantial detrimental change in their working conditions (see pages 14 to 15).

The right to object

Finally, employees do not transfer under TUPE if they object to it beforehand. This is covered later on, in the section on Termination of Employment (see pages 13 to 15).

What rights and obligations transfer?

In legal terms, the new employer of staff who transfer under TUPE steps into the shoes of the old employer for most purposes. It is as if the new employer has always been the employer of the individuals concerned. Transferring employees' past employment with their old employer will count as continuous with their new one for most purposes.

There are some legal exceptions and some difficult areas which are considered below. But for the most part the position is straightforward: rights and obligations under the employment contract of a transferring employee go across intact to the new employer.

Example

An employee is entitled to a salary of £100,000 per year with his old employer. The new employer must also pay the employee £100,000 per year unless it can negotiate a change (although this carries its own complications under TUPE – see pages 11 to 13 below).

Example

Before a TUPE transfer, the old employer's managing director sexually harassed an employee. The MD has stayed with the old employer but the harassed employee has transferred under TUPE. Strange as it may seem, the new employer is liable for the MD's actions towards the employee concerned because this is a liability in connection with her employment contract which has transferred with her.

Example

Employees are paid monthly in arrears on the last day of each month. The transfer takes place on 15 May. The new employer must still pay the employee for the full month worked on the 31 May even though for half of May the employee was actually working for the old employer.

It is normal for the new employer to seek contractual protection against liabilities referable to employment with the old employer (see pages 22 to 24 below). For instance, in the second example above the new employer should negotiate an indemnity with the old employer to secure reimbursement of any fees and damages it may have to pay in respect of the harassment.

Pension rights

In many cases, pension entitlements go across under TUPE in exactly the same way as any other benefit. This applies to personal pension schemes, group personal pension (GPP) schemes and 'stakeholder' schemes.

Example

Pre-transfer, the old employer paid 10% of an employee's salary into her personal pension scheme. That obligation goes across to the new employer.

Example

Pre-transfer, the old employer paid 5% of the employee's salary into a GPP scheme provided that the employee also contributed 5% of his salary into that scheme. The pension will have to operate in exactly the same way after the transfer.

Occupational schemes

Occupational pension schemes are different. If the old employer has a pension scheme which it has set up itself with company and member-nominated trustees, then – subject to the major caveats below – the new employer is *not* obliged to replicate the old scheme. It has the choice of either admitting transferred employees to its own occupational pension scheme or it can make a contribution to a stakeholder scheme.

In either case, in broad terms, it is a pre-condition that the employer must be prepared to pay up to 6% of the employee's salary into such a scheme and can only require the employee to match employer contributions up to a maximum of 6% of salary. Nevertheless, this may result in a substantial deterioration in pension benefits for the employees who transfer. (The relevant rules are not contained in TUPE but in the Pensions Act 2004 and the Transfer of Employment (Pension Protection) Regulations 2005.)

Example

The old employer had a final salary scheme. The new employer operates a GPP scheme for its entire staff, under which it pays contributions of 10% of salary so long as the employees do the same. The new employer cannot simply admit the transferred employees into its GPP, as that is neither an occupational scheme nor a stakeholder scheme. In any case, the requirement on the employee to match contributions at 10% would be a breach of the Pension Protection Regulations. Unless the new employer can get this particular group of staff to contract out of the Regulations, it must either set up its own stakeholder scheme for them or (less likely) set up a special occupational pension scheme for them.

Example

Pre-transfer, the old employer had an occupational money purchase scheme under which it paid 12% of employees' salary into the scheme on a non-contributory basis. The new employer wishes to implement the cheapest scheme possible in replacement. It would be entitled to offer to match employee contributions into a stakeholder scheme up to 6%.

Example

The old employer had a final salary pension scheme. The new employer may replace this with a stakeholder scheme so long as it will match contributions up to 6%, even though the benefits to the employees will be far inferior.

Some rights under occupational pension schemes do still transfer under TUPE. This is a complex and uncertain area but it includes schemes conferring pension benefits in the event of early retirement. As almost all occupational pension schemes include early retirement benefits, the incoming employer in these circumstances may find it safer to replace transferring employees' occupational pension entitlements with a scheme providing equivalent benefits – albeit that this will be expensive.

In addition, employers inheriting staff from public sector bodies under TUPE need to be aware that public sector procurement requirements will generally require employees to be provided with pensions that are certified by the Government Actuary's Department to be substantially equivalent to those they enjoyed in the public sector.

Finally, as we shall see later (page 14), employees who suffer a substantial change in working conditions following on from a TUPE transfer may be able to claim constructive unfair dismissal. Therefore, even where an employer has complied with the Pensions Act 2004 and the Pension Protection Regulations, there may technically still be scope for employees whose pension rights have suffered on a transfer to bring claims.

Benefits which are difficult to replicate

Only occupational pension schemes are treated differently under TUPE: no other exceptions are made. The new employer is therefore theoretically obliged to replicate all other contractual benefits. This can be awkward in relation to benefits that are difficult to pass in practice such as profit-related bonus, commission, share schemes or share options. However, the courts have taken a pragmatic approach to these issues and will look for new employers to provide schemes of broad equivalence.

Example

Under TUPE, an employer is inheriting a profit-related pay scheme which is tied to the profits of the old employer. The new employer is likely to have done enough to satisfy TUPE if it can show it has introduced a broadly equivalent scheme which pays out depending upon its own financial performance.

Non-legal entitlements

Whilst legally the new employer steps into the shoes of the old employer under TUPE, this does not mean that the new employer has to do everything the same way. Some changes which the new employer will wish to introduce will not impinge on legal rights at all.

Example

A sales executive's contract says that he reports to an account director or such other person as the company may specify. The new employer wishes the sales executive to report to its finance director. The new employer is operating within the contractual flexibility which the old employer conferred upon itself, so TUPE is not engaged (unless the change amounts to a substantial detriment – see below page 14 – which is unlikely).

Example

The old employer had a practice of having a team meeting every morning for an hour. The new employer thinks this is inefficient and wishes to do away with the meeting. This is in no way a breach of contract and unlikely to be regarded as a substantial detrimental change to the employees' working conditions. Accordingly, the new employer is free to make the change.

Trade union recognition and collective agreements

TUPE contains provisions requiring the transfer of trade union recognition arrangements and collective agreements in some circumstances. However, since such agreements tend to be voluntary and 'binding in honour only' in the UK, they can be terminated with relative ease (subject to industrial relations issues). Accordingly, TUPE generally has little practical impact in this area.

One situation where the transfer of a collective agreement is significant is where it confers rights which are incorporated into employees' contracts. Employees' rights to benefit from collectively agreed terms are deemed to be 'static' rather than 'dynamic' – that is, they only get the benefit of whatever has been negotiated at the date of the transfer, unless the new employer is a party to subsequent negotiations.

Example

Homer works in Springfield District Council's vehicle maintenance division. His employment contract says that his main terms and conditions, including pay, are as set out in the current national agreement between local authorities and trade unions. In June 2007 the council outsources its vehicle maintenance function to a private contractor, Mendit Ltd, and Homer's employment transfers across under TUPE. In July 2007 a fresh national agreement is negotiated incorporating a 15% pay rise for motor engineers. Homer is only entitled to his rate of pay as at the date of transfer: he cannot require Mendit to apply the 15% increase.

Dismissal and changing terms

This section explains the restrictions on changing employees' terms and conditions in the context of a TUPE transfer and then goes on to examine the circumstances in which employees can be fairly dismissed. We also look at the position of employees who object to the transfer.

Changing terms and conditions

TUPE makes life difficult for employers wishing to change terms and conditions following a transfer.

To bring about a change in working conditions in the absence of TUPE, you normally need to get the employee's express consent (although sometimes consent can be implied). The good news is that once consent is obtained, it is invariably binding on the employee. This provides welcome certainty for the employer.

The position where TUPE applies is very different. The basic rule is that no detrimental variation of any contractual term by reason of a transfer or for a connected reason is permitted. This applies even where the employee's position is better overall as a result of the changes and he or she has expressly consented to them. Because any such consent is effectively invalid, employees have the right subsequently to claim any pay or benefits which they expressly agreed to waive – going right back to the date of transfer. Obviously this can give rise to significant and unexpected liabilities for an employer.

Example

An employee expressly agrees to five fewer days' holiday per year in exchange for a 10% pay rise. A year later, having pocketed the extra pay, he demands his additional holiday back (or further pay in lieu of lost holiday). TUPE allows the employee effectively to 'cherry pick' the terms he considers most favourable to him. That said, it is possible that the employer might be able to reduce the employee's salary back to its previous level when he demands his original holiday entitlement. The law is unclear on this last point.

When does TUPE allow changes?
There is an exception to the above rule. It is permissible for employees to contract out of the protection otherwise afforded by TUPE provided the variation is:

→ either totally unconnected with the transfer; or
→ for a reason connected with the transfer which involves a change in job functions.

Both of these hurdles are difficult for an employer to clear. Most employers want to change terms and conditions after a TUPE transfer because they simply want to 'harmonise' the terms of the transferring employees with those of their existing workforce. But this will almost certainly be considered to be a change by reason of the transfer and so void under the general rule. For the exception to apply, it is likely that the new employer needs to show further reasons.

Example
An employer inherits a group of employees under TUPE who are entitled under their contracts to be paid £20 per hour, whereas existing staff doing exactly the same type of work are paid only £17 per hour. It persuades the transferring staff to reduce their rate of pay by £3 in exchange for a one-off payment of £4,000. This would not be a valid variation under TUPE. The employees could take the £4,000 and still claim to be entitled to be paid £20 per hour. Arguably they would not even have to pay back the £4,000.

Example
Clerical staff transfer under TUPE to a new company, which decides it needs to retrain them to perform a combination of clerical and production work. The employees are prepared to agree. Although the reorganisation is for a reason connected with the transfer, it is likely to be treated as a change in job functions and so not void.

Practical solutions
In summary, the TUPE provisions on changing terms are highly restrictive and inflexible. There are, however, some possible routes for an incoming employer seeking to change terms and conditions post-transfer.

One option is to terminate employees' contracts and offer continuing employment on the new terms. This is on the basis that dismissals at or around the transfer count as effective, even if they are due to the transfer itself. The main disadvantage of this approach is that the dismissed employees may claim unfair dismissal – and a transfer-related dismissal in these circumstances would most likely be automatically unfair (see below page 13).

In this type of situation, it is unclear how far compromise agreements can help in securing binding contractual changes. Case law suggests that compromise agreements are effective to settle claims of employees *dismissed* by reason of a TUPE transfer, but not where they are used to vary existing terms in respect of *continuing employment* following the transfer.

A different tactic altogether is to allow as much time as commercially possible to pass between the transfer and the contractual change. That is, until such time as the link between the desired variation in terms and the transfer can safely be regarded as broken. Unfortunately there is no prescribed period after which changes can be freely made and much will depend on the particular facts. But it is inevitably harder for an employee to show that a particular variation was caused by a TUPE transfer that took place many months or even years previously.

Another way of weakening claims that contractual changes are linked to a TUPE transfer is to delay them until the next scheduled pay review. If the employer offers a pay rise in exchange for employees accepting certain contractual changes, it may have an argument that the main cause of the changes was the pay rise rather than the transfer.

'Substantial' changes and breach of contract
Apart from the above rules, there are two further provisions of TUPE that are relevant to changing terms and conditions. Firstly, TUPE confirms that employees can resign and claim constructive dismissal in response to a serious breach of contract by their employer. Secondly, employees can also treat themselves as dismissed where a transfer involves or would involve a 'substantial change in working conditions' to their 'material detriment'. Both of these provisions are covered in more detail in the following section.

Termination of employment

Under TUPE, both the old and the new employer may dismiss employees for reasons connected with the transfer. But whilst such dismissals are not void, the employees may be entitled to compensation for unfair dismissal (if they have over one year's service).

In fact, there are three categories of dismissal under TUPE:

- dismissals mainly by reason of the transfer itself, or for a reason connected with the transfer that is not redundancy or a reorganisation – these are automatically unfair;
- dismissals by the new employer for a reason connected with the transfer arising from a redundancy or reorganisation – these are potentially fair so long as the employer satisfies the test of 'reasonableness' under normal unfair dismissal rules; and
- dismissals unconnected with the transfer – normal unfair dismissal rules apply, so these may be fair or unfair depending on the circumstances.

A dismissal could be before or even some years after the transfer and still be 'connected' with it.

Where an employee is dismissed by reason of the transfer, but before the transfer takes place, liability for that dismissal will pass across under TUPE.

Example
Banana plc agrees to buy Pomegranate Ltd, a subsidiary of Strawberry plc, on condition that Pomegranate's highly paid chief executive is dismissed beforehand. The dismissal will be by reason of the transfer, automatically unfair and Banana will become liable for it under TUPE.

Example
A small defence company wins a service contract from the incumbent contractor. Three engineers from the old contractor are transferred to the company under TUPE, on account of the change in service provider.
The defence company already employs five of its own engineers, and decides it can only afford to employ six engineers in total.

Whilst the business has a valid reason for dismissing two engineers (i.e. redundancy), simply selecting and dismissing two of the three transferring engineers would be unfair. All eight engineers should be considered in the pool for redundancy, and a proper scoring/assessment process for selecting two of them should be carried out.

Can employees refuse to transfer?
Sometimes employees facing a transfer will, for whatever reason, not wish to transfer. They have a right to object to being transferred, but this brings their employment to an end without a dismissal. In effect, the employee leaves employment without any remedies for the ending of the employment contract. He or she cannot claim unfair dismissal, for example, or damages for notice.

This may seem a little harsh, but it can be a useful 'exit route' for employees quickly to extricate themselves from a business, as they are released from any obligations they would otherwise have to give notice.

Example
The 20 stores of regional supermarket chain Marrs are purchased following a hostile takeover by supermarket giant Morrisseys. Marrs' logistics manager Henry is one of 500 staff transferring under TUPE and his job will remain much the same post-transfer. However, he worked for Morrisseys ten years ago and left after a personal disagreement with the chairman. He does not wish to return.

Henry's contract with Marrs provides for one year's notice on either side. He now has a golden opportunity to join another company, Stone Roses Distribution, and would like to give notice to resign as soon as possible. However, if he transfers under TUPE he expects that Morrisseys would put him on garden leave (which is permitted under his contract with Marrs). The solution is for Henry to write to Marrs before the transfer saying he objects to becoming employed by Morrisseys. He will then not have to give notice and his employment will end at the point of transfer.

Objections do not need to be in writing to be effective, but it is always better for evidential purposes if the employer gets the employee to confirm a verbal objection in writing.

Constructive and 'quasi-constructive' dismissal
In addition to the simple type of objection described above, where no claim arises, there are two situations under TUPE in which an employee is entitled both to object to the transfer and claim for unfair dismissal:

→ where the transfer involves a major detrimental change in an employee's terms and conditions such as to amount to a serious breach of contract (known as 'constructive dismissal');
→ where the transfer involves or would involve a 'substantial change in working conditions to the material detriment' of a transferring employee. This has been dubbed 'quasi-constructive dismissal', as it gives rise to a right to claim unfair dismissal but not notice pay.

In either case, the employees' rights may, depending on the circumstances, be exercisable against the old employer as well as the new one. If an employee is treated as dismissed under either of these provisions, the dismissal is likely to be automatically unfair unless the employer's actions arose out of a reorganisation and it acted reasonably.

The scope of the quasi-constructive dismissal provision is unclear but it is a potentially powerful right. The employee has no need to show a breach of contract, just a substantial detrimental change in working conditions. It might, for example, cover a major workplace relocation which makes it more difficult or expensive for the employee to get to work.

Example

Bernard has worked for Joy Division Games for 18 months as an IT programmer, based in Docklands in an air-conditioned office overlooking the Thames. His contract states his place of work to be any office in London that the company may direct him to attend. Bernard is due to transfer under TUPE to New Order Computers, who intend to move Joy Division's workforce to their King's Cross offices. New Order point to the mobility clause in Bernard's contract and say there will be no other changes to his terms and conditions. Bernard visits the King's Cross offices, which are hot, noisy and have little natural light. Working there would also entail an extra commute of up to forty minutes each way, costing him significantly more in fares. He tells New Order he is treating his contract as at an end because he cannot face the new working conditions.

Under TUPE, New Order might argue that there is no serious breach of contract entitling Bernard to resign and claim constructive dismissal. They would say he has simply objected to the transfer, bringing his employment to an end without a dismissal. However, Bernard may claim quasi-constructive dismissal on the basis that the differences in the offices' physical conditions and the increased cost and time of commuting amount to substantial changes in working conditions to his material detriment. Until the law develops, we cannot be sure whether Bernard has a case at all. Moreover, even if there was a quasi-constructive dismissal under TUPE, it may be possible for New Order to contend it was a fair dismissal because there were sound reasons for the relocation, involving a reorganisation of jobs, and they acted reasonably in the circumstances.

Obligations to inform and consult

This section covers two separate measures that apply to employers under TUPE:

- → the duty to inform and sometimes consult representatives of employees affected by the transfer; and
- → the obligation of the old employer to give the new employer various information about the employees who are transferring and associated liabilities.

Dealing with staff representatives

TUPE requires employers to inform and in some cases consult 'appropriate representatives' of employees who are affected by a transfer. These are either:

- → representatives of a trade union recognised by the employer (if the affected employees in the category of workers covered by the recognition agreement); or
- → in any other case, employee representatives appointed or elected by the affected employees.

Employers must inform and consult trade union representatives if a union is recognised in respect of any of the affected employees. If no union is recognised, or the recognition agreement does not cover all of the affected employees, then employee representatives will be needed. These can be either:

- → standing representatives who were appointed or elected by the affected employees for other purposes (e.g. a workers' council) but who have appropriate authority to be informed/consulted in the context of TUPE; or
- → (more likely) representatives specifically elected for the purposes of consulting and receiving information. In this case, there are detailed requirements governing elections that must be followed.

What information must be provided?
The outgoing employer on a TUPE transfer must supply the following information to the appropriate representatives:

- → the fact that the transfer is to take place, when it will occur and the reasons for it;
- → the implications of the transfer for the affected employees; and
- → any 'measures' (i.e. material changes) that it is envisaged will be taken in connection with the transfer in relation to affected employees.

Note that 'affected employees' are *any* employees – of either of the parties to the transfer – who may be affected by the transfer or measures taken in connection with it. This may include staff who do not transfer. Technically the incoming employer also has obligations to inform and consult representatives of its affected employees, but this is rarely an issue in practice.

More importantly, the incoming employer must supply information about the measures it is proposing to take after the transfer to the outgoing employer to enable the old employer to carry out its duties to inform and consult. Failure to do so can give rise to significant liability for the new employer.

The information must be provided to the representatives long enough before the transfer to enable the employer to consult them effectively. How long that is will depend on how much there is to consult about.

What does consultation involve?

The duty to consult under TUPE arises only if it is envisaged that measures will be taken in relation to any of the affected employees. If no such measures are envisaged, the obligation is merely to provide information to the representatives. In this situation, the information can probably safely be handed over at the point of transfer.

Where measures are envisaged, the employer must consult with the representatives with a view to seeking their agreement to the measures to be taken. In other words, the employer must consider representations made by the representatives and reply to them. Amongst other things, if the employer rejects those representations, it should in most cases give its reasons for doing so.

Where there are sudden and unforeseen circumstances making it not reasonably practicable for an employer to comply with any duty to inform/consult, the employer need only take such steps towards performing the duty as are reasonably practicable in the circumstances. Tribunals are, however, generally reluctant to allow employers to use this defence.

What are the sanctions for failing to comply?

If an employment tribunal upholds a complaint of failure to inform/consult, it makes a declaration to that effect and may order the employer to pay compensation to the affected employees. This can be up to 13 weeks' pay, depending on what the tribunal considers just and equitable having regard to the seriousness of the employer's breach. It is known as a 'protective award'. Tribunals start at the maximum and then work downwards if the employer has good arguments in mitigation or can show partial compliance. The normal cap on a week's pay (currently £310) does not apply for these purposes.

An aggrieved representative or employee can bring a claim against either or both of the employers for failure to consult. They have to sort out between themselves how to apportion liability, although the outgoing employer should not be liable for failures wholly attributable to the incoming employer.

Example

Wideopen plc contracts out its security operation to a specialist provider, Safehands Ltd, which inherits the company's in-house security guards under TUPE. Shortly afterwards Safehands announces it will be making several of the transferred guards redundant and cutting the others' pay. The guards' union representatives bring a tribunal complaint against Wideopen, claiming they were not informed and consulted about these measures. Wideopen admit this but say it was because Safehands did not reveal their plans. The tribunal is likely to make a maximum award of 13 weeks' pay to each of the affected staff, but Wideopen can take steps to get Safehands 'joined' as a party to the proceedings with a view to the award being made against that company.

Information about employees and liabilities

In addition to the requirement to inform appropriate representatives, the old employer must give information about the transferring workforce to the new employer. This is information on:

- → the identity and age of the employees who will go across;
- → their main contractual terms;
- → any relevant collective agreements;
- → any disciplinary action (other than warnings) or grievances instigated within the preceding two years;
- → any legal proceedings brought by the relevant employees in the preceding two years; and
- → any legal claims which the old employer has reasonable grounds to believe an employee may bring.

The information must be supplied at least two weeks before completion of the transfer, unless it is not reasonably practicable to do so. It can be given in instalments and must be updated if there are changes.

If the old employer fails to comply with the rules on providing the necessary information, an employment tribunal may order it to pay compensation, taking into account any loss sustained by the new employer. The award must be a minimum of £500 per employee, unless the tribunal considers it just and equitable to award less than that.

These rules aim to protect employees from a problem that often arises where a service provision contract is re-tendered. Without these rules, new contractors could take over a contract with no idea who they would be inheriting unless the old employer was willing to tell them voluntarily, which was not always the case. This left the hapless employees to persuade the new employer that it really did now have to give them a job on their old terms.

A related problem that these rules do not solve is that bidders for service contracts may have to 'bid blind', as they have no legal entitlement to know the terms and conditions of the incumbent contractor's employees (but would still have to adopt them if they won the tender). Whilst the incumbent would have to give this information to the successful bidder, until the winner is selected it has no entitlement to the information.

Example

Some time ago, Beckham Associates outsourced their office cleaning to an external company, Gerrard Ltd. The contract is due to expire in six months' time and Beckham have decided to put it out to tender to see if they can get a better deal. Owen Ltd is interested in bidding for the contract but, at this stage, is not entitled to receive any information about Gerrard's staff to help pitch its bid – despite the fact that Owen Ltd is likely to be saddled with them under TUPE if it wins the contract. Only if Owen Ltd is successful can it require Gerrard Ltd to hand over information to enable it to plan for the arrival of new staff and assess the liabilities it will inherit. Even then, Gerrard does not have to supply the details until two weeks before the handover date.

This is bad news both for Beckham Associates, who will not get as competitive a selection of tenders as it would if the process were open, and for Owen Ltd who will not know how to price its bid. There are commercial ways around this, discussed at pages 22 to 24 below.

Transfer of insolvent businesses

This section deals with how the application of TUPE works when you are acquiring a business that has run into serious financial difficulties. There are different types of insolvency proceedings, briefly outlined below, and the extent to which TUPE applies largely depends which procedure is used.

In essence, if it is not possible to save a business and it has to be wound up, TUPE is unlikely to come into play at all. But if it is possible to keep the business going and sell it – or perhaps just the viable part of it – as a 'going concern', then TUPE may apply.

Major changes were incorporated in TUPE in 2006 to reflect the Government's commitment to promoting a 'rescue culture' for businesses that are or are likely to become insolvent. In particular, TUPE now contains two specific measures to encourage the sale of insolvent businesses as going concerns:

- certain of the business's debts to employees will not transfer to the new owner; and
- the insolvent business or the new owner may agree certain changes to terms and conditions of employment with employee representatives.

These measures are referred to below as 'the rescue provisions'. They will only apply if you are acquiring a business in respect of which insolvency proceedings are being taken with a view to survival of the business (or part of it) rather than liquidation of assets.

Types of insolvency procedures

The rules on when and how TUPE impacts on insolvency situations are complex and not entirely clear. The following is a brief summary of the main types of insolvency procedures and the extent to which TUPE is likely to apply.

Liquidation
This means the same as 'winding-up'. A liquidator is appointed to manage the business, realise its assets, pay its debts and ultimately dissolve it. This will normally be commenced at the instigation of creditors when the company is unable to pay its debts (known as a 'creditors' voluntary liquidation') or by a court making a winding-up order (known as 'compulsory liquidation').

Liquidation invariably involves the dismissal of all employees. If you are acquiring assets or taking on activities from a business which is being liquidated, there is unlikely to be a TUPE transfer, but in any event TUPE makes clear that neither its provisions on unfair dismissal (see page 13) nor those on protection of terms and conditions (see pages 7 to 10) apply at all in this scenario. However, in the unlikely event of the liquidator keeping staff on and subsequently selling parts of the business as a going concern, then other aspects of TUPE would apply – most significantly, the information and consultation obligations (see pages 16 to 17).

Bankruptcy
Personal bankruptcy occurs when an individual cannot pay his or her debts. Proceedings are started by a court making a bankruptcy order, on application either by a creditor or by the individual himself or herself. A trustee in bankruptcy then takes control of the individual's assets.

In this situation, TUPE could potentially come into play if you are acquiring from a bankrupt with a business which employs staff. However, the restrictive rules on the application of TUPE to liquidation proceedings (see above) apply in the same way to bankruptcy proceedings.

Administration
Companies go into administration when they are insolvent but have a good chance of survival. An administrator can be appointed by the court, by the directors or shareholders of the company or by someone who holds a 'floating' charge over its assets.

The main purpose of administration is to create a breathing space with a view to the business carrying on as a going concern. If that is not possible, the administrator tries to secure a better result for creditors than would occur on liquidation. This might entail selling all or parts of the business or its assets.

If you are acquiring a business (or part) that is in administration, TUPE will apply in its normal way. However, since the main purpose of the insolvency proceedings is to save the business, the rescue provisions apply.

Receivership
The main purpose of receivership is to realise sufficient funds to pay off the company's creditors, either by selling off its assets or disposing of the business as a going concern. In this case, the insolvency practitioner may be:

→ an 'administrative receiver' – appointed by the holder of a floating charge over the company's assets;
→ a 'fixed-charge receiver' – appointed by the holder of a charge over specific assets of the company; or
→ a receiver appointed by the court.

Normal TUPE rules apply to the transfer of a business in receivership or part of one. However, according to the DTI, the rescue provisions apply only to administrative receiverships and not to fixed-charge or court-appointed receiverships.

Voluntary arrangements
Sometimes a company will enter into a voluntary arrangement with its creditors, supervised by an insolvency practitioner, with a view to continuing as a going concern. If you buy the assets of a company whilst under the arrangement, TUPE will apply including the rescue provisions.

Freedom from certain employee debts

In situations where the rescue provisions apply, the debts to employees that do not transfer under TUPE include:

→ statutory redundancy payments;
→ up to eight weeks' arrears of pay;
→ payment for the statutory minimum notice period (i.e. up to the maximum 12 weeks);
→ up to six weeks' accrued holiday pay; and
→ any basic award of compensation for unfair dismissal.

All of the above are subject to the statutory cap on a week's pay (currently £310). When an employer becomes insolvent, employees can receive payment of these debts by making an application to the Insolvency Service.

Importantly, liability for other debts passes to the new owner of the business under TUPE in the normal way. This would include, for example, any amounts in excess of £310 per week or in respect of full contractual notice pay. So whilst this might initially appear attractive to a prospective purchaser, it is actually very limited in scope.

Example

Company A goes into administration and it is decided one of its insolvent businesses should be sold. Company B wants to buy the business, but intends to make a number of the employees assigned to the business redundant. It finds out that the employees are entitled to a generous contractual enhanced redundancy scheme.

Under the provisions outlined above, Company B will avoid liability only for the statutory redundancy pay due to the employees. Any payment owed beyond that by Company A under the enhanced redundancy scheme will transfer under TUPE. Company B could try and get this liability is apportioned between the parties in the purchase agreement, although negotiating indemnities in relation to insolvent businesses tends to be difficult in practice.

Agreed changes to terms and conditions

The second rescue provision is the flexibility to agree changes to employees' terms and conditions in certain insolvency situations. Such variations would most likely be void under TUPE under normal circumstances (see page 11).

The changes must be designed to safeguard employment opportunities by ensuring the survival of the business. If that is so, the insolvent business, its new owner or the insolvency practitioner can agree the changes with employee representatives, despite the fact they are by reason of the transfer or connected with it. The changes will take effect as terms of employees' contracts of employment, even without their individual agreement.

Example

Company B, having bought Company A's insolvent business, believes it can turn it around by reducing employees' salaries. A trade union is recognised in respect of the employees assigned to the business. Company B is free to agree the salary reductions with the union representatives if it can show this is designed to ensure the survival of the business (i.e. by making it more profitable) and safeguard employment opportunities (i.e. by avoiding redundancies). The salary reductions will be effective with or without employees' individual agreement. Any agreed variation agreed could not breach employees' statutory entitlements – so, for example, Company B could not reduce the salaries below the national minimum wage.

If the employee representatives are not union representatives, there are additional safeguards:

→ the change must be recorded in writing and signed by each of the representatives (or a duly authorised agent); and
→ in advance of the agreement being signed, the employer must provide all employees with the text and guidance on its implications.

Practical points to consider

There are many practical matters that contractors and sellers and purchasers of businesses need to consider when negotiating the deal. In particular, the incoming employer will want to know as much as possible about what it is acquiring and any potential liabilities it is taking on.

As we have seen, the old employer's obligation to provide information about the transferring workforce is unlikely to give the new employer all the information it needs (see page 18 above). This is because the information that the old employer is obliged to give excludes certain types of information and also because it needs to be given only to the successful bidder. So in practice, the incoming employer will need to make specific enquiries at an early stage in order to acquire comprehensive details of the operation, the employees and any liabilities.

Once the new employer has sufficient information to assess the risks, it may well want to protect itself through the outsourcing contract or business sale agreement (as the case may be). This protection could be in two main forms:

- → **'warranties'** – legal statements that particular facts are correct. If a warranty turns out not to be true, a claim for damages can be brought.
- → **'indemnities'** – contractual promises to compensate the other party for specific losses or damage suffered.

Due diligence and staff information

Assuming TUPE applies, the new employer is the party mainly at risk because it is the one which will acquire the employees and almost all of the liabilities associated with them. It will therefore want to know:

- → who is employed in the operation (or the relevant part);
- → what terms those staff are employed on; and
- → what claims it is at risk of inheriting.

If the transfer is a business sale, the buyer should ask for this information as part of a 'due diligence' exercise into the state of the business at the start of negotiations. This will form part of the buyer's assessment of whether the business is worth buying and how much it should pay. The seller will expect to have to provide the information as a prerequisite of securing a sale.

But what if the transfer comes about through a change in contractors on the outsourcing of an activity? In this situation, a new company bidding for the contract is in a more difficult position to obtain the information. The incumbent contractor may not have any incentive to provide the information and, as it is in danger of losing the contract, may simply refuse. As for the information it is required to give under TUPE, this will most likely be provided too late to be of any practical value. We set out some suggestions on how to deal with this in the outsourcing contract below (under 'Indemnities on an outsourcing').

Indemnities on a business sale

On the sale of a business, once the buyer knows what liabilities it may be inheriting, it will want the seller to give appropriate indemnities. In particular, it should request indemnities for:

- → any liabilities relating to the period during which the transferred staff worked for the seller (e.g. unpaid wages);
- → any other liabilities which it inherits (e.g. unfair dismissal claims because the seller dismissed staff unfairly for a reason connected with the transfer);
- → any claim of any kind against the buyer by any employee other than those named as transferring; and
- → any liabilities arising from a failure by the seller to inform and consult with affected staff.

The indemnity should cover costs the buyer might incur, as well as the liability itself.

As the thrust of TUPE is to transfer staff and liabilities to the new owner of the business, the seller will be at less risk than the buyer. However, the seller normally asks for indemnity protection too to cover:

- → any liabilities relating to periods during which the transferred staff work for the buyer;
- → any claim by an employee who resigns before the transfer date because of detrimental changes the buyer intends to make to his or her terms or working conditions; and
- → any liabilities arising from a failure by the buyer to inform the seller of relevant measures it envisages will be taken in relation to affected employees.

Unexpected transferees

One tricky issue that sometimes arises is individuals transferring when they are not expected to do so. An employer might acquire employees under TUPE (and an obligation to pay them) in circumstances where it was not anticipating that.

The most common way to deal with this is to provide in the contract that, if individuals do unexpectedly transfer, the new employer can dismiss them within a reasonable time and the old employer will indemnify against any salary costs and unfair or wrongful dismissal claims.

Example

Boozer Ltd is selling a large chain of pubs to Alehouse Ltd and has supplied details of the staff employed in the relevant establishments. However, Alehouse is worried that, since Boozer has a transient and constantly changing workforce, it might end up inheriting staff under TUPE it does not know about. Alehouse should ensure the transfer agreement allows it to dismiss such employees and requires Boozer to pick up the bill for any salary paid to them and the cost of any claims they might bring. Boozer will want to make sure the indemnity is carefully drafted. It should not, for example, cover salary costs for any period during which Alehouse unreasonably delays in dismissing employees, nor for any period in which they actually do work for Alehouse.

Indemnities on an outsourcing

The most important point to remember about outsourcing is that there may not only be a TUPE transfer at the start of the arrangement. There is potentially another transfer at the end, when a new contractor is appointed or the client takes the service back in-house. The outsourcing contract should deal with both scenarios.

An incoming service provider will want the same information about staff and liabilities it will inherit as would the buyer of a business. It will also want the same indemnities. On the initial outsourcing, the client will be able to give the necessary information and indemnities because the staff transferring will be its own employees. However, on any subsequent transfer, the staff will be employed by the outgoing service provider. Therefore, the client should ensure that the initial contract also provides that:

- → the service provider cannot unreasonably change the staff working on the contract or account or alter their terms during the course of the contract;
- → at a reasonable time before the end of the contract, the service provider will give the client or a prospective new contractor relevant information about the staff, their terms and any liabilities;
- → the service provider will inform and consult affected staff on a subsequent transfer (either to a new contractor or back to the client); and
- → when the contract ends, the service provider will indemnify the new contractor or the client (as the case may be) against liabilities that arose during its watch and which might transfer.

Further details

At Lewis Silkin LLP we have a devoted team of specialists in the law covered in this publication. They have been involved in many of the leading cases in this area.

We also produce TUPE News, an occasional email update on the employment law aspects of business transfers and outsourcing.

For more details, please contact our TUPE team at tupe@lewissilkin.com or your regular contact at Lewis Silkin LLP.

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