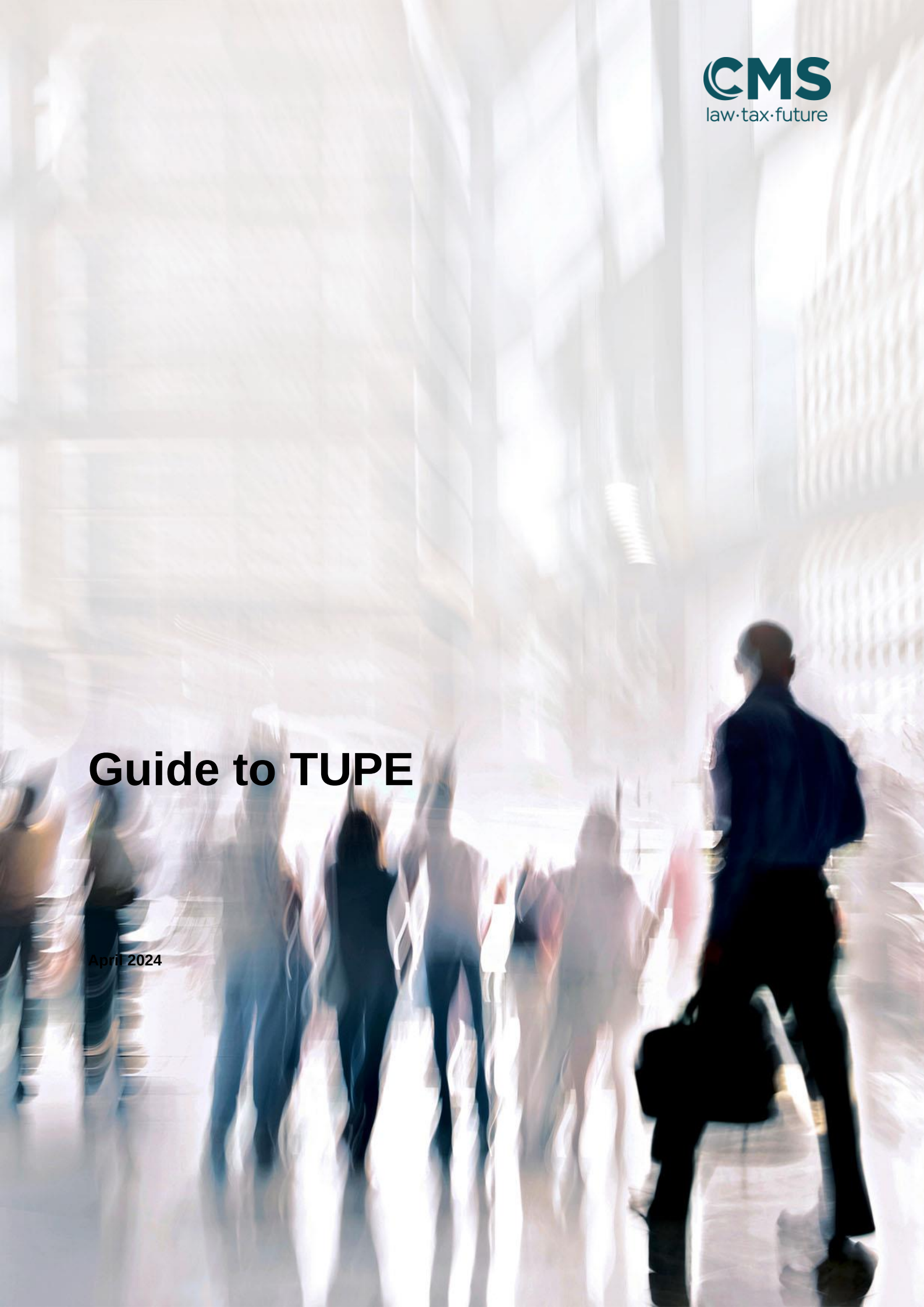

Guide to TUPE

April 2024

Guide to TUPE

This guide outlines the legal position in relation to the transfer of undertakings and covers:

— introduction;

— when does TUPE apply?

— effect of TUPE;

— contracts of employment;

— protection against dismissal;

— right to object to the transfer;

— detrimental changes as a result of the transfer;

— contract variations;

— information and consultation;

— insolvency;

— pensions;

— employee liability information;

— practical implications;

— future developments; and

— further resources.

Introduction

The Transfer of Undertakings (Protection of Employment) Regulations were introduced in 1981 to protect employees when the business they work in transfers to a new owner. These Regulations implemented the Acquired Rights Directive (the “Directive”) and, since their introduction, have generated significant litigation.

The Government recognised that the case law involving when TUPE applied was confusing and on 6 April 2006 the Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE”) came into force, replacing the 1981 Regulations. Further changes to TUPE were made in 2014.

When does TUPE apply?

TUPE applies to:

— a transfer of an undertaking or business (or part of one), situated in the United Kingdom immediately before the transfer, to another person, where there is a transfer of an economic entity which retains its identity; and

— certain “service provision changes” (see below).

There is no upper or lower limit to the size of undertaking to which TUPE applies meaning that TUPE may apply, at one extreme, to the transfer of a very large business with thousands of employees or, at the other extreme, to a very simple agreement for the provision of services such that the transfer of a solitary cleaner’s role could potentially be subject to TUPE.

TUPE applies to employees, but the Regulations use a broad definition of the word employee. It does not apply to independent contractors and freelancers. There is, however, uncertainty over whether TUPE applies to workers, and in one UK tribunal case TUPE did apply to workers. However, until there is an appellate decision to establish this point, the position is uncertain.

The terms used in TUPE to describe the “old” and “new” employers are “transferor” and “transferee”, but for ease of reference we refer to them in this guide as “outgoing employer” and “acquirer”.

Transfer of an undertaking

TUPE defines an “economic entity” as an organised grouping of resources which has the objective of pursuing an economic activity. This is classically the case on the sale of a business as a going concern and is the type of standard business transfer.

TUPE does not apply:

— to pure asset sales (i.e. where no goodwill or employees transfer) or where the transaction is by way of share sale (although, a 2007 Court of Appeal case held that a TUPE transfer could occur alongside or after a share sale in certain situations); or

— where the entire undertaking is situated outside the United Kingdom (although, in the European Union, local laws also implementing the Directive are likely to apply. Additionally, many non-EU jurisdictions have legislation similar to TUPE so this point is always worth checking if there is an international element to a transaction).

TUPE can apply when the undertaking is situated in the UK but transfers to another country (whether or not that country is in the EU).

Service provision change

TUPE deals explicitly with outsourcing scenarios – termed “service provision changes”. Outsourcing includes both first-generation outsourcing (for example, where a function such as cleaning or catering is outsourced by an employer to a contractor) and second-generation outsourcing (for example, where a customer chooses a new contractor to provide the outsourced services). Similar considerations apply to “insourcing”, where an employer brings previously outsourced services back in house.

If there is an organised group of employees based in Great Britain whose principal purpose is to carry out activities for a “client”, TUPE will apply where:

— the client ceases to carry on those activities on their own behalf and they are carried on by a contractor instead (i.e. “first generation” outsourcing);

— a contractor ceases to carry out those activities for a client and they are carried out by another, subsequent, contractor (i.e. “second generation” outsourcing); or

— a contractor or subsequent contractor ceases to carry on the activities and the client undertakes them themselves instead (i.e. “insourcing”).

There will be no service provision change, however, where:

— there is a change in the client for whom the activities are carried out; or

— the “activities” transferring comprise a single specific event or task of short-term duration (for example, a conference); or

— the “activities” consist wholly or mainly of the supply of goods (for example, where a client engages a contractor to supply sandwiches to its canteen every day, for the client to sell on to its own staff).

TUPE expressly provides that the activities carried out by the acquirer must be “fundamentally the same” as those carried out by the outgoing employer. Another requirement is for there to be an organised grouping of employees which carries out activities for the client. In practice, this means that in most cases a detailed analysis of the facts is required to determine whether TUPE is likely to apply and even then the position may remain uncertain. We have also seen several cases deal with the issue of fragmentation where services are split and transferred to multiple contractors. In one case this involved the contract of a transferring worker being split between multiple transferees.

Which employees transfer?

TUPE will operate to transfer the employment of employees to the acquirer if they are assigned (other than on a temporary basis) to the entity that is subject to the relevant transfer. The key issue is one of assignment. Employees assigned to the entity (“the organised grouping of resources or employees”) will transfer with it. Employees who are not assigned to the entity will not transfer.

If employees work in a different part of the business but their work relates exclusively or mainly to the entity being transferred, they may be regarded as “assigned.” A body of case law has built up to determine whether an employee has been wholly or mainly assigned, which takes into account factors such as the amount of work the employee does for that part of the business and how integrated they are.

Effect of TUPE

The main implications of TUPE applying to a transaction are summarised below:

— individuals who are employed by the outgoing employer “immediately before the transfer” and assigned to the relevant business or group automatically become employed by the acquirer from the date of the transfer;

— the employees transfer on their existing terms and conditions of employment and with their continuity of service maintained;

— with certain limited exceptions, the acquirer inherits all of the outgoing employer’s “rights and liabilities” arising from those employees’ contracts of employment so, for example, if an employee had been the victim of unlawful race discrimination by the outgoing employer before the transfer, liability for that will pass to the acquirer;

— in some circumstances, the acquirer will remain bound by trade union recognition rights and collectively agreed terms;

— a dismissal of any employee (whether before or after the transfer) will be automatically unfair if the sole or principal reason for the dismissal is the transfer. If the sole or principal reason for the dismissal is an “economic, technical or organisational reason entailing changes in the workforce” (“ETO reason”) it will not be automatically unfair, but may still be unfair under normal unfair dismissal principles;

— the outgoing employer must provide certain information to appropriate representatives of its affected employees;

— the outgoing employer and/or the acquirer may have to consult with appropriate representatives of the affected employees about the effects of the transfer and the acquirer may have to provide information to the outgoing employer which will enable the outgoing employer to do this;

— where the outgoing employer and the acquirer agree, the acquirer may elect to begin collective redundancy consultation with the outgoing employer's employees before the proposed transfer takes place; and

— the outgoing employer is required to provide the acquirer with certain information about the employees which the acquirer is to inherit, known as employee liability information.

Contracts of employment

TUPE operates to transfer virtually all of the rights and obligations connected with the transferring employees' contracts of employment from the outgoing employer to the acquirer. The limited exceptions to this include, for example, criminal liabilities and certain pension rights.

The employees' continuity of employment is preserved and the acquirer effectively "steps into the shoes" of the outgoing employer as the employer of the employees. This means that the acquirer is treated as always having been the employees' employer, and any claims that an employee may have had against the outgoing employer arising from the period prior to the transfer will automatically transfer to the acquirer. For example, if an outgoing employer failed to pay a bonus that an employee was entitled to receive prior to the transfer, any action they brought after the transfer would be against the acquirer.

In some circumstances, the acquirer remains bound by the terms of a collective agreement agreed by the outgoing employer with a trade union it recognises, as well as recognition rights in relation to that trade union.

Protection against dismissal

Where TUPE applies, the acquirer of the undertaking inherits all the employees who were employed in the undertaking "immediately before" the transfer. Under TUPE, the acquirer cannot simply pick and choose which employees it wishes to take from the outgoing employer.

Where the sole or principal reason for an employee's dismissal is the transfer - for example, where the acquirer dismisses employees who are transferred to it simply because it does not require them, or where the outgoing employer dismisses employees prior to the transfer at the acquirer's request - such dismissal will be automatically unfair for unfair dismissal purposes, unless the sole or principal reason for the dismissals is an ETO reason, for example a genuine redundancy.

However, even if such an ETO reason can be shown, the dismissal may still be unfair under normal unfair dismissal principles if, for example, a fair procedure is not followed.

Right to object to the transfer

Employees have a statutory right to object to the transfer (i.e. they cannot be forced to move with the undertaking or activities), in which case they cease to be an employee but are not treated as having been "dismissed" and so have no recourse against the outgoing employer or the acquirer. For this reason,

disaffected employees rarely take up this option. If they do, however, any objection should in most cases be made before the transfer.

Detrimental changes to working conditions as a result of the transfer

An employee may resign on the basis of an actual or proposed substantial change in their working conditions as a result of the transfer which is to their material detriment and, under TUPE, their resignation will be treated as a dismissal. This applies whether the outgoing employer or the acquirer proposes the change. In contrast to a constructive dismissal claim under the Employment Rights Act 1996, the employee does not have to show that the change is a fundamental breach of their contract, nor even a breach of contract at all.

In many cases, the sole or principal reason for the change in working conditions will be the transfer and not an ETO reason and so the deemed dismissal will be automatically unfair.

Contract variations

Any variation of transferring employees' contracts of employment is void if the sole or principal reason for the variation is the transfer. The exception to this is in the case of variations where:

— the sole or principal reason for the variation is an ETO reason entailing changes in the workforce and the employer and employee agree that variation; or

— the terms of the contract of employment already expressly permit the employer to make such a variation.

In practice, the ETO reason will apply only in limited circumstances, for example where changes are necessary to avoid redundancies, are part of a comprehensive restructuring that involves changes to job functions across a workforce, a change in the actual composition of the workforce or a change in the employees' place of work.

These provisions will not assist in the common situation where the acquirer wants to harmonise the terms and conditions of employees it has inherited with those of its existing employees. In some cases, even such variations that take place some considerable time after the transfer may be found to be of no legal effect if the sole or principal reason they are made is the transfer and there is no ETO reason for them. Employee consent to such variations is irrelevant and it does not matter that employees' overall packages remain the same or are more favourable.

In some circumstances, collectively agreed terms of employment agreed by the outgoing employer with a recognised trade union also transfer to the acquirer with the transferring employees. Changes which were made to TUPE in 2014 allow the acquirer to vary the terms of a collective agreement which are incorporated into transferring employees' contracts of employment provided:

— the variation takes effect not less than one year after the date of the transfer; and

— that following the variation, the employees' rights and obligations under their contract of employment when considered together are no less favourable.

Information and consultation

Consultation with representatives

TUPE imposes an obligation to provide information to, and (in some circumstances) to consult with, representatives of the affected employees prior to the transfer.

Currently, micro-businesses with fewer than ten employees may inform and consult with employees directly if there are no representative(s) in place. However, changes contained in The Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023 will remove the requirement for consultation for:

- employers with fewer than 50 employees; and/or
- employers of any size where the transfer involves fewer than ten employees.

This will apply to transfers on or after 1 July 2024.

The information and consultation obligations under TUPE apply to a wider group of employees and not just those who are assigned. "Affected employees" include those who are transferring, as well as other employees who may experience a "knock on" effect as a result of the transfer (e.g. because their job duties or shift arrangements change).

Where employees are represented by an independent trade union recognised for collective bargaining purposes, the relevant employee representatives will be representatives of the union.

Where no such union is recognised, the obligation is to inform (and consult, if required) with either representatives who are part of an existing consultative body (provided that they already have a mandate to be consulted on TUPE transfers) or with representatives elected specifically for this purpose. There are detailed rules governing elections for employee representatives, but in essence, the elections must be fair and there are statutory protections for employees who stand for election or who are elected as representatives.

Required information

The outgoing employer is obliged to inform the appropriate representatives (i.e. the trade union representatives or elected representatives) of:

— the fact that the transfer is going to take place;

— the approximate timing of the transfer and the reasons for it;

— the legal, economic and social implications of the transfer for the affected employees;

— whether any “measures” are envisaged in connection with the transfer by either the outgoing employer or the acquirer; and

— certain information relating to its use of agency workers.

Measures are, essentially, any changes connected with the transfer that may impact upon the affected employees.

This may include redundancies, changes to terms and conditions of employment or a relocation resulting from the transfer.

Such information must be provided long enough before the transfer to give adequate time for consultation.

If measures are proposed, the outgoing employer must consult with the representatives about the proposed actions. There is no obligation to reach agreement, but consultation should take place in good faith with a view to reaching agreement and good practice means that would likely involve the outgoing employer

considering and responding to any representations made, giving reasons for any rejection of such representations.

The acquirer is under an obligation to inform the outgoing employer of any measures that it intends to take, so that the outgoing employer may carry out its information and consultation obligations. In some circumstances the acquirer may also have an obligation to inform and, if necessary, consult with its affected employees about the transfer.

Sanctions for failure properly to inform and consult

An employer who fails properly to inform and consult may be ordered to pay a “protective award” of up to 13 weeks’ pay (uncapped) for each affected employee. Note that this may be a wider class of people than just the transferring employees if, for example, there are other “knock-on” effects elsewhere in the business.

Where the outgoing employer has failed to inform or consult affected employees, the acquirer is jointly and severally liable with the outgoing employer in respect of the compensation payable. It is therefore important that, where commercially possible, appropriate protection is obtained by the acquirer and this is usually in the form of legal indemnities in the agreement effecting the transfer.

Micro businesses (businesses with fewer than ten employees) are not required to inform and consult with appropriate representatives and provided there are no representatives in place can consult with the affected employees directly.

Pre-transfer collective redundancy consultation

Where both the outgoing employee and the acquirer agree, the acquirer may elect to begin collective redundancy consultation with appropriate representatives of affected employees before the transfer takes place.

In very broad terms, where the acquirer is proposing to dismiss as redundant 20 or more employees within a 90 day period and these proposals may affect transferring employees, the acquirer can undertake its collective consultation obligations pre transfer as if it were already the transferring employees’ employer. For more information on collective consultation obligations generally, please see our guide to redundancy.

Insolvency

In order to encourage a “rescue culture”, TUPE has some specific provisions which apply in the case of outgoing employers subject to specified insolvency proceedings. This is a complex area, but we summarise the main provisions below.

In insolvency situations, how TUPE applies depends on whether the outgoing employer is subject to “relevant insolvency proceedings” or “bankruptcy or any analogous insolvency proceedings”.

“Relevant insolvency proceedings” are often referred to as “non-terminal” insolvencies because they have been opened not with a view to liquidation of the assets of the business, but with the aim of maintaining the business as a going concern. Where the outgoing employer is subject to relevant insolvency proceedings, some debts relating to the transferring employees will not pass to the acquirer, as would normally be the case under TUPE, but will be paid out of the National Insurance Fund (NIF). Such debts include statutory redundancy pay and arrears of pay and holiday pay, although these are subject to maximum limits and the acquirer will be liable for all debts in excess of the limits. There is also potentially greater scope to vary the terms of employment of the transferring employees.

Where the outgoing employer is subject to “bankruptcy proceedings or analogous insolvency proceedings” - essentially meaning they have been commenced with a view to liquidation of the assets of the outgoing employer (often called “terminal” insolvency) - employees will not automatically transfer to the acquirer and transfer related dismissals will not be automatically unfair.

There is no exemption from the obligation to inform and, if necessary, consult with appropriate representatives of affected employees when the outgoing employer is subject to insolvency proceedings.

Pensions

The application of TUPE to pensions is a complex area in itself and specialist advice should always be sought. A basic outline of the current position may be summarised as follows:

— personal pension/stakeholder pension rights transfer under TUPE;

— where the transferred employees were a member of, or entitled to be a member of, an occupational pension scheme, most rights and liabilities typically will not transfer, but the acquirer must, as a minimum, provide instead:

  - a defined benefit pension plan (i.e. a “final salary” pension plan) that meets certain minimum standards; or
  - a defined contribution arrangement (i.e. a “money purchase” pension plan) to which the acquirer contributes at a specific rate.

However, rights to enhanced redundancy payments or early retirement under an occupational scheme will transfer.

Different rules apply in practice in transfers involving employees in the public sector.

Employee liability information

Required information

The outgoing employer is obliged to inform the acquirer of the following “employee liability information” at least 28 days before the date of the transfer (unless special circumstances make this not reasonably practicable):

— the identity and age of the employees assigned to the organised grouping of resources or employees subject to the transfer;

— particulars of employment required to be given to an employee under section 1 of the Employment Rights Act 1996;

— information on any disciplinary procedure taken against any employee or grievance procedure taken by any employee within the previous two years;

— information on any court or tribunal case, claim or action brought by any employee against the outgoing employer within the previous two years, or any potential court or tribunal case, claim or action which may be brought by them where the outgoing employer has reasonable grounds to believe that might occur; and

— information relating to any collective agreements which apply to them.

The information must be up to date as at a specified date not more than 14 days before the date on which the information is notified.

Sanctions for failure properly to provide employee liability information

If an outgoing employer fails properly to provide employee liability information, the acquirer can bring an employment tribunal complaint. If the tribunal considers the complaint well founded it may make an award of compensation to be paid by the outgoing employer to the acquirer. The amount of compensation will be what the tribunal considers just and equitable in all the circumstances, subject to a minimum of £500 per affected employee (unless the tribunal considers it appropriate to award a lesser sum), but with no upper limit. Again, note that this may affect a wider class of people than just the transferring employees if, for example, there are other "knock-on" effects elsewhere in the business.

In calculating the amount of compensation the tribunal has to have particular regard to:

— any loss sustained by the acquirer that is attributable to the outgoing employer's failure properly to provide employee liability information; and

— the terms of any transfer-related contract between the acquirer and the outgoing employer under which the outgoing employer may be liable to pay a sum to the acquirer in respect of a failure to provide any employee liability information.

Practical implications

Given the various obligations and liabilities to which TUPE can give rise where a transfer takes place, it is important, where possible, both to reduce the risk of valid claims (for example, by carrying out a proper information and consultation process) and/or to incorporate appropriate terms in the commercial agreement governing the transfer. There is a clear distinction between the technical legal position under TUPE and what can be provided for under contractual provisions in the relevant commercial agreement(s). Often, for example, the outgoing employer will agree contractually that it will bear all liabilities arising before the transfer and that it will indemnify the acquirer against such liabilities.

TUPE is a complex and ever-changing area of the law. As touched on above, there are also very different rules that apply where the outgoing employer is insolvent. It is always important, therefore, to seek specific advice on the application of TUPE to any given situation.

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Further resources

Government guidance on employment rights or the transfer of an undertaking can be found here.