

## TRANSFERS OF UNDERTAKINGS - A CONCISE INTRODUCTION



The law relating to transfers of undertakings is notoriously complex and is constantly developing. Inevitably, this account can only be an introduction, highlighting some of the major issues.

The basic concept is simple: ***if an undertaking is taken over by - or is transferred to - a new owner/employer, the staff are entitled to transfer to the new employer, with their existing rights, contracts and continuity of service intact.***

However the application of this principle in practice can be problematical. Key questions which have regularly troubled practitioners - and the Courts - are:

- **Which transfers are covered** by the Regulations? (pages 2-3)
- Which **employment rights** are protected? (see pages 3-5); and for **how long?** (pages 4 and 7)
- Can the new employer **change terms and conditions** for the transferred staff? (pages 6-7)

In April 2006, the Government finally introduced the new 2006 version of the Transfer of Undertakings (Protection of Employment) Regulations (known as the '**TUPE**' or **Transfer Regulations**). These amend the original 1981 Regulations, give effect to the 1998 EU 'Acquired Rights' or 'Business Transfers' Directive and take account of Court decisions as to the proper interpretations of the Transfer Regulations during recent years. The DTI has produced useful Guidance.

### A. THE OVERALL EFFECT OF THE REGULATIONS

The TUPE Regulations now apply to **all undertakings** of all sizes, whether or not commercial ventures, and whatever the number of employees involved. There are 5 main elements of protection:

- (a) **Employment contracts transfer automatically** for those employed 'immediately before' the transfer from the 'old' to the 'new' employer - ie: the staff involved transfer to the new employer **on the same terms and conditions**, with their **continuity of service preserved** (Regulation 4).
- (b) Any **dismissals** (or **changes of terms and conditions**) for reasons connected with the transfer are **automatically unfair** unless there is an economic, technical or organisational reason entailing changes in the workforce - an 'ETO' reason (Regulation 7). Note that redundancy and restructuring can be ETO reasons. See page 6 below.
- (c) **Collective agreements** transfer (Regulation 5).
- (d) **Trade union recognition** transfers - if the undertaking retains a distinct identity. (Regulation 6)
- (e) The employers are obliged to **inform** and **consult** their employees affected by a proposed transfer - either via recognised trade unions or workers' representatives. (Regulation 13).

- (f) The old ('transferor') employer is obliged to give the new employer '**employee liability information**' - ie: written information as to the transferring staff (Regulation 11).

## B. WHICH TRANSFERS ARE COVERED?

TUPE - or not TUPE? That is the question.....The 2006 Regulations make clear that they apply not only to conventional 'takeovers' by a new employer, but also to virtually all 'contracting out' exercises and 'contracting-in' operations (the bringing back of services 'in house') - ie: in the words of the Regulations, TUPE protection now applies to 'service provision changes'.

### THE KEY CRITERIA

The Transfer rules apply to '**any transfer** of an undertaking, business [or part thereof] situated in the UK to another person where there is a transfer of **an economic entity which retains its identity**'.

An 'economic entity' is defined as 'an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.' (Regs 3(1) & (2) )

NB: 'Resources' means not just equipment, premises, etc., but also (sometimes crucially) *employees*.

There are effectively two types of transfer situations - both now governed by the TUPE rules:

#### 1. Direct Transfers:

Here, the key question is: **Has there been a transfer of a going concern?** Or, put simplistically: after the transfer, can you see **the same business**, although **in different hands**?

Cases have indicated that the following criteria will all be relevant - although none is alone conclusive:

- whether the transferred business undertakes **similar activities** after the change of employer;
- whether the business **retains its identity** in the new employer's hands;
- whether **assets**, premises and/or goodwill are transferred;
- whether the majority of **staff** (or key employees) are taken over;
- whether the **customers/clients** are taken over;
- the length of any suspension of operations before the new business starts up.

In straightforward cases, a new employer takes over an existing undertaking and it continues as a going concern). The assets (eg: premises and equipment, customers, clients and the existing staff) all go across. Examples would be the 'absorption' of one independent school by another, or the transfer of an existing local authority school to become an independent 'Academy'. All these are **unmistakably covered** by the TUPE Regulations (but be aware of the 'ETO' proviso).

Alternatively, if, for example, a school or College closes down and the students and staff disperse - essentially at their own initiative - to other institutions, there is unlikely to be a 'TUPE transfer.

Note, however:

- if there is **no change of employer** (eg: an LA school is 're-started' under new management, but within the same LA control), TUPE rules and protections for staff do **not** apply;

- where a 'community' (or 'voluntary controlled') school changes status to become a **foundation school**, the staff transfer to the new school - but via a 'statutory transfer' (under the *School Organisation (Prescribed Alterations to Maintained Schools) England Regulations 2007 (S I 2007 No.1289)* - not under the TUPE Regulations. Note that, in this situation, the fully-fledged protections under the TUPE Regulations set out in this summary do not apply.

## 2. 'Service Provision Changes'

In a major extension to the previous text, the 2006 Regulations contain explicit provisions making clear that virtually all 'contracting-out', 'contracting-in' and 're-tendering' operations are now covered by the 'TUPE' protection rules - provided that there is a change in employer:

A 'service provision change' occurs when there is 'an **organised grouping of employees**' in the UK whose 'principal purpose' is the 'carrying out of the activities concerned on behalf of the client' and the client intends that the activities will, following the service provision change, be carried out by the transferee - ie: by a 'new' employer'. (Regulation 3 (3) ).

This covers three situations:

- **Contracting-out:** where activities cease to be carried out by the client on his own behalf and instead are carried out by another person on his behalf. Examples might be the 'privatisation' of Local Authority services such as prison education, or the contracting-out by Colleges of their cleaning, catering or transport operations;
- **Re-tendering exercises:** where activities cease to be carried out by an existing contractor on a client's behalf and instead are moved (over the head of the existing provider) to another person - a subsequent contractor, who may be a business rival. Examples in the world of education would be where a College/University switches its already contracted-out cleaning or security operation to a new external supplier;
- **Contracting-in:** where activities cease to be carried out by a contractor - or a subsequent contractor - and instead are 'taken back' to be carried out by the client on his own behalf (Regulation 3 (1) b )

### 'TRANSFERS OF PART'

Where only part of an undertaking is transferred to a new owner, employees will transfer across to the new employer if, but only if, they were **assigned** (other than on a temporary basis) **to the organised grouping of resources or employees which transfers**. Factors such as the amount of time they spend in that part of the business, the terms of their employment contracts etc. are likely to be relevant factors.

## C. THE EFFECT OF A 'TUPE' TRANSFER

### 1. Dismissals (Regulation 7)

Dismissals - or imposed changes in terms and conditions - (either by the 'old' or 'new' employer) for which the sole or principal reason is either the **transfer itself, or a reason connected with the transfer** are **automatically unfair** (but, significantly, subject to the 'ETO' exception below). Further, the Regulations do not state how much time must elapse after a transfer before dismissals will be regarded as **not** arising for a reason connected with it (see 2. below).

This important rule provides two central protections for staff involved in a TUPE transfer: firstly, (subject to the 'ETO' exception) they cannot be dismissed by their former 'old' - employer in anticipation of a forthcoming transfer - and secondly, they cannot (again, subject to the ETO exception) be dismissed - or have new terms/conditions imposed - by the

transferee - 'new'- employer as a result of the transfer. Liability for any pre-transfer dismissals arising from the transfer passes to the transferee 'new' employer.

However, if the (old or new) employer can show that the principal reason for the dismissal is an '**economic, technical or organisational reason entailing changes in the workforce**' (an 'ETO' reason) - ie: effectively, **a restructuring** - the dismissal is not automatically unfair, but will be assessed as to fairness by the Employment Tribunal according to the established principles of unfair dismissal law. **Redundancies** and **reorganizations** in a transfer situation can often be justified as being for an ETO reason (see Section D on page 6 below).

**Qualifying for** To qualify for unfair dismissal protection in a transfer situation, staff must fulfill **Protection:** the usual continuous service requirements (ie: **1 year**).

## 2. Conditions of Service (Regulation 4)

The TUPE Regulations oblige the new employer to 'stand in the shoes' of the transferor employer. Accordingly, all contractual rights (such as pay and conditions) and statutory rights (such as continuity of service) transfer across without alteration.

**Length of** An obvious area of uncertainty is: how long does the protection against dismissal  
**Protection:** and/or changes in terms of employment last after the transfer? There is no set time for this '**nursery period**'. If the new employer wishes to be sure that TUPE protections have expired, he must wait long enough to be able to validly say that the dismissals/changes in terms are not 'connected' with the transfer. A recent University case suggests that two years may not be long enough:

### ***London Metropolitan University v Sackur, IDS Brief 817, November 2006***

The University took over another institution and, after 2 years had passed, imposed changes in the contracts of the transferred staff, to harmonise their terms with its existing employees. The staff claimed continuance of their previous contracts under 'TUPE' protections.

**Held (EAT):** Claims succeed. Even though two years had elapsed, the changes imposed were still to be regarded as being connected with it - and so were invalid.

## 3. Collective Agreements (Regulation 5)

Rights under existing collective agreements transfer across to the new employer under TUPE. Accordingly, many provisions as to **individual rights to pay and conditions** etc. set out in collective agreements - such as the 'Burgundy Book' (for teachers); the Whitley Council (for health staff) **will transfer** intact, provided they are incorporated in staff contracts. These may include a right to future pay increases when these standard pay scales are revised or updated.

**A '12 Month** Article 3(2) of the EU Business Transfers Directive enables Member States to  
**Rule'?:** limit the period for observing terms in a collective agreement after a transfer to (not less than) one year. In fact our Government has not defined the period of operation of collective agreements in the UK Regulations - and so this limitation does not apply. In short, this EU Article does not mean that all collective agreements are automatically preserved for only 12 months after a TUPE transfer.

#### 4. Trade Union Recognition (Regulation 6)

Regulation 6 **preserves union recognition** across a TUPE transfer so that the union is recognised by the new employer as it was by the transferor. However, there is a significant proviso: this **only** applies where after the transfer the undertaking **'maintains an identity'** distinct from the remainder of the transferee's (ie: the 'new' employer's) undertaking. Note that the new employer is still able to take steps to 'derecognise' a union.

#### 5. Collective Consultations (Regulation 13)

The TUPE Regulations now require both the 'old' and 'new' employers to **inform** and **consult** representatives of the employees who may be affected by the transfer - and to do so **'long enough before'** the transfer to enable the consultations to take place. **Information** as to the transfer and any **'measures envisaged'** in connection with it must be given, but there is no explicit requirement for this to be in writing.

These consultations are to be undertaken **'with a view to seeking agreement'**, with either recognised trade union representatives or (if there is no union recognised) with elected workforce representatives. The Regulations (in contrast to the requirements as to redundancy consultations) oblige the employer(s) to **consider** the representations and **reply** to them - stating reasons if they are rejected.

Significantly, the obligation to inform and consult now falls upon **both the transferor and transferee employers** in respect of not only their own, but also the 'other' employer's, workers, if they are to be affected by any proposed 'measures'. Finally - and also in contrast to redundancy consultations - these consultations are required **whatever the number of employees affected** (ie: the TUPE Regulations do not apply only to the minimum of 20 staff which applies in redundancy law). Failure to consult can result in affected employees claiming a 'protective award' of up to 13 weeks' (actual) pay.

#### 6. Provision of Information (Regulation 11)

The 2006 Regulations introduced a new and significant obligation on the 'old' (ie: the transferor) employer: to provide the new employer with **'employee liability information'** ie: details of the employees who are due to transfer. In particular, this must include for each individual:

- Their identity and age;
- Their key employment particulars (such as their job titles, salary, hours of work, holiday rights, length of continuous employment etc.);
- Details of any disciplinary or grievance procedures invoked during the last two years;
- Details of any legal actions brought against the employer within the last two years - and of any potential legal actions which he has reasonable grounds to anticipate.

This information must be given in writing (or in another 'readily accessible form') at least 14 days before the transfer (or, if 'special circumstances'- which are not defined - arise, as soon as is reasonably practicable). It can be provided either directly or via a third party.

#### 7. Pension Rights (Regulation 10)

Benefits under **occupational pension schemes** are **excluded** from TUPE protections.

However, the 2004 Pensions Act - and the accompanying Transfer of Employment (Pension Protection) Regulations) 2005 - oblige the new employer to provide the transferring staff with at least a minimum pension scheme (but not necessarily an equivalent, or final salary,

scheme). Put simply, the new employer can choose whether to offer a final salary, a money purchase or a stakeholder scheme, but as a minimum his contribution must match the employees' contributions up to 6% of gross pay.

A Cabinet Office 'Memorandum' recommends that, in public sector transfers, the transferring body should ensure that the pension arrangements for transferring staff are equivalent to their existing benefits.

## D. REFUSALS TO TRANSFER

There are two provisions for individuals who are unwilling to accept a transfer to the new employer :

- Firstly, an employee can inform either the old or new employer that s/he **'objects' to transferring**. This has the unhelpful effect of terminating their contract at the point of transfer - but without any entitlement to claim that they have been dismissed - ie: they have no right to claim compensation or a redundancy payment (Regulation 4(7) ).
- Secondly, if the transfer would involve a **'substantial change in working conditions'** which is to the employee's **'material detriment'**, s/he can treat the transfer as a dismissal - and, potentially, can claim compensation for unfair dismissal in the Tribunal. This might provide a way forward, for example, for an employee whose workplace is relocating or who faces a loss of status. (Regulation 4 (9) ).

## D. THE 'ETO' DEFENCE

A dismissal, or an imposed change in terms/conditions, will be automatically unfair if it arises from the transfer - or from a reason connected with the transfer - unless it is for an **'economic, technical or organisational reason entailing changes in the workforce'** (an 'ETO').

**'Entailing Changes in the introduction of Workforce'**:  
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Note that to avoid automatic unfairness, a dismissal, or the new terms connected with a transfer, must not only

technical or organisational' reason - but the process must **also 'entail changes in the workforce'**. (ie: it must involve a genuine business reorganisation, entailing changes in the numbers of staff and/or their job functions). Mere changes in the **identity** of individuals or the **harmonising** of terms and conditions to save money will not be enough.

Clearly, **redundancy** (eg: where the employer reduces the numbers of staff) and **restructuring** (where job descriptions and terms/conditions change) can be 'ETO' reasons, potentially justifying dismissals/changes arising as a result of the transfer.

Where an ETO reason is established, an Employment Tribunal will regard the reason for the dismissal as legitimately being 'some other substantial reason' and it will go onto analyse the fairness/reasonableness of the dismissal under the established principles of unfair dismissal law.

In the case of a reorganisation, the Tribunal is likely to take account of factors such as the **importance** of the change to the business, the timing, length and extent of **consultations with staff** over the proposals, **notice** given to the staff - and whether other employees have accepted it.

## E. CHANGING TERMS AND CONDITIONS

A recurring question is whether (and when) the new employer can alter the terms and conditions of the incoming staff, either to save costs - or to harmonise terms with their existing workforce.

**Agreements to Change** A major controversy has been whether the new (transferee) employer can **negotiate** and **agree revised terms/conditions** with the staff that he is taking on - or whether the Regulations (which preserve their existing terms intact) prevent this. For example do they restrict 'freedom of contract' - even if both employer and employee wish to agree new terms? One Court of Appeal judgement suggests that any agreement for revised terms - **if it arises from the transfer** - is simply **invalid**:

**Terms:**

***Crédit Suisse First Boston (Europe) Ltd v Lister* 1998 IRLR 700 CA**

L worked for a merchant bank which was then taken over by Crédit Suisse in a TUPE transfer. He agreed revised terms with CS in return for a substantial 'retention award' in cash and shares, which included a new clause preventing him from working for a competitor if he left voluntarily. He then resigned to work for a competitor. CS sought an injunction to prevent him. L argued that his revised terms (even though he had agreed them) were unenforceable under TUPE rules.

**Held (CA):** (i) Injunction refused.  
(ii) His new contract, because it arose from the transfer (and no 'ETO' reason arose), was **unenforceable**. An employee cannot agree to waive TUPE rights.

A recent case suggests that transferring staff have the welcome option under the TUPE Regulations of accepting changes to their terms which are favourable, whilst at the same time opting to preserve existing benefits which they do not wish to lose, ie: to '**cherry-pick**' amongst any new terms and conditions:

***Power v Regent Security Services Ltd*. 2007 IRLR 226 EAT**

Mr P transferred to Regent with a retirement age of 60, but later this was changed by agreement to 65. The employer subsequently tried to dismiss him at 60, arguing that the post-transfer change (even though to Mr P's benefit) was invalid, since it was connected with the transfer.

**Held (EAT):** A transferred employee may choose whether to accept a new contractual term offered/introduced by the new employer or to preserve their existing entitlement.

**The Current Position:** Following a transfer, the staff (and the new employer) are effectively 'tied' to existing/transferred terms for the time being and the employees cannot waive their 'TUPE' rights (ie: give up the benefit of their existing terms) by simply agreeing new contracts - even if both sides want to do so. [However, see c) below].

Accordingly, an employer who wishes to 'harmonise' or alter the terms/conditions of transferred staff (whether or not with their agreement) has several options:

- a) He can validly introduce new terms/conditions if either:
- He **waits long enough after the transfer** (and ideally waits for a subsequent change in circumstances to arise) to be certain that the new terms will not be seen as being introduced for a reason connected with the transfer. [Note that in *London Metropolitan University v Sackur, 2006* - see page 4 - two years after the transfer was held not to be long enough to negate the connection]; or
  - He introduces the changes **as part of a reorganisation** of the workforce, in which the numbers or job functions of the staff change (ie: an 'ETO' reason)
- [NB: Although changes introduced in these ways avoid the danger of them being *automatically* unfair under the TUPE Regulations as in C (page 3) above, they could still potentially be challenged by aggrieved employees as unreasonable. Employers would be wise to obtain agreement to them - see e) below].
- b) He can formally **dismiss** the staff - and then offer them new terms of contract (ie: go through a '**dismissal and re-engagement**' process). This 'crystallises' their TUPE rights, ie: it brings their existing conditions to an end - but it enables them, of course, to pursue potential compensation claims for unfair dismissal (or unlawful deductions) - with good prospects of success.
- c) He can agree new terms with the incoming employees via a formal individual **Compromise Agreements**, which by settle any potential Tribunal claims. (This is permitted by Regulation 18 - and appears to be the safest option).

[In one particular situation, the Regulations do enable alterations to terms/conditions to be validly agreed (without compromise agreements). Where the transferring business is under **insolvency proceedings**, variations may be agreed (either with the recognised union or employee representatives) - provided that they are 'designed to safeguard employment opportunities by ensuring the survival of the undertaking' (Reg. 9)].