

TUPE - an employee's guide



In law, the relationship between employer and employee is a personal one. The terms of this relationship are set out in the contract of employment.

Strictly speaking, if a business changes hands, an employee will lose his or her job. This could lead to claims for unfair or wrongful dismissal and is inherently unfair.

The TUPE (Transfer of Undertakings Protection of Employment) Regulations make changes to the strict common law position. These Regulations were revised and updated with effect from 31 January 2014.

TUPE Regulations

The TUPE Regulations bring into UK law the terms of the European Acquired Rights Directive.

The stated purpose of the European Directive was 'to provide for the protection of employees in the event of a change of employer, in particular to ensure that their rights are safeguarded'.

The Regulations try to achieve this by:

- Creating protection from dismissal, where the dismissal is by reason of the transfer.
- Providing a framework for protecting existing terms and conditions as at the date of transfer.
- Creating an obligation to inform and consult the workforce whenever there is a proposed transfer.

Are you protected?

An employee must be able to show:

1. There is an undertaking

The employee must normally show that he or she is part of "an identifiable economic entity" which retains its identity after the transfer. The Tribunal must look at all surrounding facts and decide on balance what picture emerges. It can be difficult to predict what view a Tribunal will take.

2. The employee must be assigned to the undertaking

The employee must work within the entity transferred. This might involve consideration of, amongst other things, the employee's terms and conditions, the time spent in that part of the undertaking, the amount of value they contribute to that unit and how the employee is funded within the business.

3. There is a transfer

Business sales are obviously included, but also mergers, the granting of franchises, the movement of companies in a group and the 'contracting out' cases have all been held to be transfers. The Regulations sets out specific conditions for 'service provision changes'. There may be a service provision change:

- a) Where activities cease to be carried out by a person on his own behalf (a client) and are carried out instead by another person on the client's behalf (a contractor);
- b) Where activities cease to be carried out by a contractor on a client's behalf and are carried out instead by another person (a subsequent contractor) and the activities carried out by this subsequent contractor are fundamentally the same as the activities carried out by the person who ceased to carry them out;
- c) Where activities cease to be carried out by a contractor or subsequent contractor on a client's behalf and are again carried out instead by the client on his own behalf (going 'back in-house').

Protection from dismissal

An employee with a minimum of 2 years' service is protected from dismissal.

Any dismissal, whether before or after the date of transfer, is automatically unfair if the sole or principal reason is the transfer itself - unless it is for an economic, technical or organisational reason (an 'ETO' reason) entailing changes in the workforce. To rely on this 'ETO' defence the employer must establish that it was a reason which either related to the profitability of the business, to the production processes or to the management or organisational structure of the business. If a dismissal is for an 'ETO' reason it may still potentially be unfair. Also, even if the dismissal is not connected with the transfer it may still be unfair. This will depend on the circumstances in which the dismissal arose.

Protection of terms and conditions

The new employer, the 'Transferee', steps into the shoes of the old employer (the 'Transferor') after the transfer. As such, all the transferor's rights, powers, duties and liabilities under or in connection with the contracts of transferring employees are transferred to the transferee. This includes terms derived from collective agreements in place at the time of the transfer.

Any variation to the transferring employee's contract of employment is void if the sole or principal reason for the variation is the transfer. However, such variations are permitted if the sole or principal reason for the variation is an 'ETO' reason entailing changes in the workforce provided that the employer and employee agree the variation. Such variations are also permitted if the terms of the transferring employee's contract permit the employer make them.

With regards to terms of employee's contracts derived from collective agreements, 'Transferees' are able to change these one year after the date of the transfer, provided that the overall change is no less favourable to the employees.

Employees benefiting from profit share or share option schemes usually have the right to expect that the new employer will introduce 'substantially equivalent' alternatives.

Pension

The provisions of an Occupational Pension Scheme which relate to benefits for old age, invalidity or survivorship will not transfer to the Transferee. However, there are separate duties imposed by law which require the Transferee to give an employee access to a Pension Scheme. If the employee has to make contributions to that scheme from salary, the employer must match those contributions up to a maximum of 6% of salary.

Insolvency

If, at the time of transfer, the business is subject to insolvency proceedings, then it is possible for either the Transferor or the Transferee to agree a variation of contracts of employment with appropriate Trade Unions or other employee representatives, particularly where that is designed to safeguard employment opportunities by ensuring survival of the business.

Furthermore, not all the insolvent Transferor's debts will pass with the business into new hands. Payments such as wages owed, redundancy pay or notice pay are likely to be met by the State.

The right to be consulted

Employees and their representatives have a right to be informed or consulted when a transfer is proposed. This covers all 'affected employees'. Information about the date of transfer, the reason for it and the legal, social and economic implications and any proposed measures for the affected employees must be given. If measures, including, for example, changes to terms and conditions of employment, are to be taken by the Transferee in relation to employees, then there must be consultation with a view to reaching agreement about those issues.

This Fact Sheet is for information only and is not intended to be a substitute for legal advice.

For more information on TUPE and other Employment Rights, please call our Employment Rights team on 033 3344 9603.

Sign up to our monthly employment email update by emailing clair.watmore@morrishsolicitors.com