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A GUIDE TO TUPE TRANSFERS

Guide

June 2018

The CIPD is the professional body for HR and people development. The not-for-profit organisation champions better work and working lives and has been setting the benchmark for excellence in people and organisation development for more than 100 years. It has more than 145,000 members across the world, provides thought leadership through independent research on the world of work, and offers professional training and accreditation for those working in HR and learning and development.

Guide

A guide to TUPE transfers

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1 Introduction

TUPE is an acronym for the Transfer of Undertakings (Protection of Employment) Regulations 2006. Although the detail of the regulations can seem rather complex and technical, the underlying purpose is very straightforward. The rules simply aim to protect employees if the business they work for changes hands.

This guide outlines the main legal requirements surrounding TUPE transfers, as well as the essential steps involved in managing such transfers, together with some good practice guidance.

We explain the two main situations where TUPE applies (business transfers and service provision changes) and the protection that TUPE gives to employees in these situations. The guide provides explanations about information, consultation, dismissals and pensions.

Although experienced HR professionals handle many aspects of TUPE themselves, the area is constantly evolving. This guide covers the essential elements of a TUPE transfer. For queries related to a specific transfer, members can telephone the CIPD legal helpline, although in some cases ongoing legal advice may be needed.

The full titles of the legislation and amendments to it are set out in Appendix 1, together with a summary of the key terminology used in this guide. In the appendices you will also find diagrams illustrating six key stages involved in a TUPE transfer and an overview of the financial exposure of the employer to claims under TUPE.

Case study

Throughout this guide, by way of example, we use a case study based on a fictional medium-sized business, Broadway Lettings Limited (Broadway). This company is a national firm of commercial estate agents. It offers expert advice and managing agents' services to those looking to buy, rent, sell, let or manage business premises in urban areas across the UK.

Ava is the HR director at Broadway and is based at its head office in Birmingham. She is assisted by an HR team, in particular a senior HR manager, Liv.

A number of potential TUPE situations arise at Broadway, both at head office and in some of the regional offices. The situations arise as a result of some acquisitions of smaller businesses and premises, and other TUPE problems result from obtaining new property management service contracts and from putting some services out to tender.

When does TUPE apply?

TUPE applies in two situations:

- 1 when a business (or part of one) is transferred to a new employer
- 2 when a service provision change takes place.

These situations are explained in more detail under separate headings below. Some transfers will fall into both categories, so there can be both a business transfer and a service provision change at the same time.

If there is a business transfer (such as a merger or acquisition), whether TUPE applies is likely to be apparent at an early stage; input from HR can help to ensure the transaction

proceeds with less legal and commercial risk. In a service provision change, HR will be able to help identify if TUPE applies at all and help manage the situation where the employees or incoming employer dispute that it is applicable.

What would happen without TUPE?

The easiest way to understand TUPE is to imagine the position without the regulations. Without the rules, if a business changed hands, the incoming business could, in theory, treat employees in the same way as any other asset. The new business could pick and choose the employees it wanted to keep, and the outgoing business could simply dismiss any employees who were not wanted, while complying with any other legal requirements such as contractual notice periods.

Legal implications

When TUPE applies, the buyer steps into the seller's shoes, taking on the rights, responsibilities and liabilities of the seller towards the employees.

This means that following a business transfer or service provision change:

- All employees employed immediately before the transfer are automatically transferred to the buyer.
- Employees are protected against having their terms and conditions changed in connection with the transfer.
- Employees can claim automatically unfair dismissal if they are dismissed on account of the transfer.
- The seller and the buyer both have an obligation to inform and consult representatives of affected employees.

Transfer of liabilities

The effect of TUPE is drastic, in that the employee's contract of employment automatically transfers to the new employer. The effect is as if the contract was made originally between the employee and the new employer.

Liabilities that transfer from the outgoing employer to the new one include all statutory and contractual rights. So, if the old employer did something to trigger claims, liability will pass to the new employer, including claims of, for example, unfair dismissal and discrimination. Responsibilities that transfer include:

- 1 current terms and conditions of employment
- 2 continuity of service
- 3 redundancy payments, both statutory and contractual
- 4 arrears of pay, holiday pay and sick pay and any accrued holiday entitlement
- 5 liabilities accruing prior to the date of transfer under employment protection legislation, including liability for unfair dismissal and discrimination
- 6 the terms of any collective agreement incorporated into the employment contract
- 7 some other existing liabilities that are non-employment-related, such as the old employer's liability for other wrongdoings known as tort (for example, for personal injury)

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- 8 share options that will be lost and that should be compensated by an equivalent provision or payment
- 9 similar private medical insurance and health insurance
- 10 indemnities under employer's liability insurance.

There are special provisions for dealing with pensions. Criminal liability and liability to third parties for civil wrongs will not automatically transfer.

Business transfers

TUPE applies to a business transfer if there is the transfer of 'an economic entity which retains its identity'. An economic entity means an organised group that is pursuing an economic activity. This is sometimes a difficult issue to decide, and can be broken down into two parts:

- Is there a stable economic entity that is capable of being transferred?
- Will the economic entity retain its identity after the transfer in question?

Examples of business transfers

Some general examples that show situations where TUPE has been found to apply include mergers, sales of a business by sale of assets, a change of a franchisee, and a sole trader's business or partnership being sold or transferred. Other examples include the transfer of a lease (such as a hotel), a management buyout or an intra-group transfer.

Service provision changes

It is not just business transfers where the employees employed in the business (or relevant part of the business) automatically transfer to the new employer immediately before the transfer. This happens with service provision changes too. Many organisations, particularly larger ones, may regularly contract out services, invite tenders and assess bids to undertake services, and many of these situations will be TUPE transfers.

Service provision changes arise where contracts are reassigned. This can be because:

- a contractor takes over activities from a client (known as contracting out or outsourcing)
- a new contractor takes over activities from the old contractor (known as retendering)
- a client takes over activities from a contractor (known as bringing work in-house or insourcing).

Examples of service provision changes

Common examples of service provision changes include office cleaning, catering, security and other labour-intensive services. Other examples have included professional business services such as legal and accountancy services and PR account managers.

Case study

Sachin is a new assistant in Broadway's business development division. He asks Liv for advice concerning a prospective new client of Broadway.

The client owns a number of retail outlets and is unhappy with the service provided by the staff at the managing agents it has been using for the last six years. The client is impressed with Broadway and wants to change to Broadway as its new managing agents. Sachin asks Liv if she thinks TUPE would apply.

Liv seeks further crucial information, including whether there is a dedicated team at the old managing agent who manage the properties. Sachin explains that there are a number of retail outlets and it takes three employees at the current managing agent who are specifically allocated to manage the property.

Liv correctly advises that it is highly likely TUPE will apply. This is a service provision change (and it may also be a standard TUPE business transfer as well). Broadway will be obliged to take on the three employees of the old managing agent, even if it does not wish to do so, and even though the client has been unhappy with the service those employees have been offering.

Avoiding TUPE

TUPE is not an optional piece of legislation. No organisation is able to decide to opt out of it. Charitable organisations are covered by the TUPE regulations in precisely the same way as companies.

The simplest way to avoid TUPE is to transfer a business by the sale of a company's shares, a 'share sale'. In this situation the identity of the employer does not change. Therefore, the same company continues to be the employer and TUPE will not apply.

Where there is a sale of assets and goodwill, the TUPE regulations will often apply unless only limited assets or equipment are transferring to the new owner.

Although TUPE can't be avoided completely, the old and new employer can agree who will bear the financial costs resulting from failure to comply with TUPE, and decide who will pay for any consequences of one party's failure to comply with its obligations.

TUPE will not apply to a service provision change if:

- there is only a supply of goods for the client's use
- the service provided is a single event or task of short-term duration (such as an exhibition or a conference).

Case study

Broadway has engaged an external contractor to supply drinks and sandwiches for staff working at the head office and for directors' lunches and corporate entertaining when required. There have been problems with punctual delivery and the quality of the food supplied. Broadway decide to award that contract elsewhere. TUPE does not apply, as this is a contract for wholly or mainly the supply of goods. Even if there was an entire team dedicated to making sandwiches for that one contract, the staff at the sandwich company are not protected by TUPE.

Steps in TUPE transfer process

Obviously, the precise steps involved in a TUPE transfer will vary according to whether there is a 'normal' business transfer or a service provision change and depending upon whether the employer is the incoming or outgoing employer. However, the key elements are:

- **Identifying:** determine which employees are affected.
- **Information:** in good time prior to the transfer, the outgoing employer informs and consults with all affected employees, communicating the fact that the transfer is happening and how they can object.
- **Consultation with staff:** the outgoing employer will consult with all affected employees well in advance of the transfer. This may involve a trade union, or the election of 'employee representatives', who may then need to be trained before the consultation requirements can start. Businesses with fewer than ten employees must inform and consult directly with affected employees. The incoming employer must remember to inform existing employees as well.
- **Employee liability (due diligence) information:** at least 28 days before the sale or transfer of contract, the outgoing employer must make the incoming employer aware of key employee or due diligence information.
- **Measures:** the incoming employer will inform and consult on any planned measures towards the employees after the transfer considering any implications of the employees' terms and conditions of employment, including pensions.

In Appendix 2 you will find a diagram illustrating the key stages arising in most TUPE transfers.

We will now look at processes involved in the heart of TUPE transfers in more detail.

2 Identifying the employees who transfer

Whether or not staff are part of the dedicated team who transfer under TUPE is one of the most difficult areas for HR to advise on, as it depends on the specific facts of who worked where prior to each transfer.

Employees on short-term absences, holiday and parental leave are likely to be included in the transferring group. Employees on fixed-term contracts are included in those who may transfer but not agency workers. Seconded employees and those on sick leave may transfer but it will depend on the circumstances, including the length of the secondment or absence. Service provision changes can present particular difficulties when deciding which employees transfer. HR can prevent these difficulties arising in the first place by being consulted on every outsourcing, insourcing and retendering that takes place. If HR are advising the new business, the mechanisms to achieve protection include indemnities for claims arising from employees who transfer but are not really wanted and are dismissed. Other strategies include ensuring that the employees work for a variety of clients; then it is less likely there will be an organised grouping that transfers.

Case study

Four years ago Broadway entered into an ongoing contract with DPC Maintenance Limited ('DPC'). The company aims to provide regular, emergency and urgent repairs to letting agencies and landlords in the south London area. DPC employs a team of 20, including gas safe engineers, plumbers, electricians and building services engineers.

As DPC has become more and more expensive, Broadway is contemplating terminating the contract and employing similar workers directly. Five of the DPC team have recently been dedicated exclusively to Broadway maintenance matters, although they have worked for other DPC clients previously.

Assuming there is a risk of a TUPE transfer, which seems likely, would the five employees be assigned to an organised grouping of employees that would have to transfer to Broadway?

Ava and Liv will have to assess DPC's organisational structure to decide if each employee is assigned to the organised grouping of employees carrying out relevant activities. This will entail looking at how it was organised when the five employees were working for more than one client. They will have to consider what the employees' duties are under their contracts, and the overall arrangement with Broadway. The entire period of time immediately before the proposed transfer is relevant, as an employee's workload varies from time to time. A quick snapshot of the recent picture may not give a true impression of the overall position.

If Broadway had said from the outset that they did not want the same employees, and that they wanted tradespeople who continued to work for a variety of clients, the situation is less likely to have arisen.

Percentage of time worked

The classic argument in TUPE negotiations is that employees must transfer under TUPE because they spend more than 50% of their time on the transferring service. The question of percentages is a useful and practical indicator of whether an employee is likely to transfer, but an employee's position does not 'boil down' to this question alone. It is not helpful to rely on one single factor (such as the percentages of time spent) and it is much better to take a multi-factorial approach.

Old and new employers, the union or representatives will often negotiate about which employees should transfer. Employers should keep a record, considering two steps:

- 1 Is there an organised grouping of employees that had as its *principal purpose* the carrying out of the services for the client?
- 2 Is the employee assigned to such a grouping?

As well as percentages, other factors such as the cost and value of the employee to each part of the business and any managerial responsibilities should be taken into account.

Case law example

In *Costain Ltd v Armitage and ERH Communications Ltd*, the employee spent an estimated 67% of his time on the transferring part of a communications maintenance contract. The Employment Appeal Tribunal found that the tribunal had relied too heavily on the magic figure of 67%. It sent the matter back to a different tribunal to properly examine the whole facts and circumstances instead of relying on percentages to see if the employee was assigned.

Service provision changes – who transfers?

Employees who bring tribunal claims following a service provision change have to show the tribunal they were part of the dedicated team assigned to the service in order to show that they are protected and transfer under TUPE. The best way for HR to approach this is to do what a tribunal would do and examine whether there is a clear organised grouping of employees designated to that contract.

Case law examples

In *Eddie Stobart Ltd v Moreman and Others*, the Employment Appeal Tribunal (EAT) held that it is not enough for employees to carry out most of their work for a particular client; they must be organised by reference to the client's requirements and be identifiable as members of that client's team. It does not apply to a situation where a group of employees may end up working mostly on tasks that benefit a particular client without any deliberate intention or planning.

In *Seawell Ltd v Ceva Freight (UK) Ltd and another*, the employee was not assigned to the work that was taken back in house by the client. Even though the employee spent all his time working for that client, he worked as part of a team whose principal purpose was to service a variety of clients. Therefore, he did not transfer under TUPE.

3 Information and consultation

Once it is established that TUPE applies and which employees are affected, certain information has to be given to the new employer. The transferring employees also need to receive relevant information. There are no set timescales for the consultation, but the relevant information set out below must be provided to the employees or their representatives 'in good time' for sufficient consultation to take place.

Who you need to consult with

The consultation will be with either:

- **union representatives:** if the employer recognises an independent trade union in relation to all or some of the affected employees
- **employee representatives:** if there is no union representation
- **the employees directly:** but only for micro businesses with fewer than ten employees where there is no recognised independent trade union or existing appropriate representatives.

In many cases employee representatives must be elected specially and managers must be up to date with the need to invite the election of representatives and inform and consult the representatives while the transfer is being negotiated.

Case study

Broadway are acquiring a large commercial lettings business (Manchester Prestige Property Limited) with offices in Manchester, Liverpool, Leeds and Sheffield. Employees at Manchester Prestige do not have union representation and will need to elect employee representatives. The senior management at the company liaise with HR and correctly decide on the number of representatives to be elected and announce a process for receiving nominations for election. They correctly:

- Help candidates communicate their election message to all the employees entitled to vote.
- Print ballot papers and arrange for ballot boxes that are adequately confidential and supervised.
- Count the votes cast for each candidate.
- Announce and publicise the results.

However, Manchester Prestige is under time pressure to start their information and consultation and make some technical errors. The election took place at 2pm with voting to be completed by 5pm the same day. Several employees were on holiday on this day. The votes were exactly tied for one of the posts. To speed matters up, senior management chose from the tied candidates, rather than telling the employees about this.

This election of employee representatives is inadequate. The employees should have been allowed to vote at a convenient time and absent employees should have been allowed to submit their votes by an alternative method. Employers must make reasonably practicable arrangements to ensure the election is fair and the election should have taken place over a longer timescale. Employees must exercise their right to vote and it was reasonably practicable to tell employees about the tied vote and allow them to resolve it by voting again if necessary.

Manchester Prestige would be in breach of its duties to inform and consult, and the affected employees would be entitled to compensation of several weeks' pay assessed by the tribunal if any claims are brought. Manchester Prestige should disclose these potential claims to Broadway as part of the due diligence exercise and employee liability information disclosures. Under TUPE, Broadway is liable jointly with Manchester Prestige for their failure to consult transferring employees, so Ava makes detailed enquiries about the potential claims.

Information for the representatives

The employer must provide the recognised union, or the employee representatives, with:

- the fact that the transfer is to take place
- the date or proposed date of the transfer
- the reasons why it is to take place
- the legal, economic and social implications of the transfer for the affected employees
- any measures proposed in connection with the transfer that will affect the employees; if there are no measures to be taken, this must be made clear too.

In the case of the outgoing employer, it must also mention the measures it envisages the new employer will take that will affect the transferring employees. TUPE does not define measures but they are likely to include changes to existing work practices such as amount of pay, job descriptions, hours of work, collective bargaining and even the mechanics of salary payment, such as the day of the month when salary is paid.

Failure to comply

If any employer doesn't comply with these requirements, it could be ordered to pay compensation to each affected employee of up to a maximum of 13 weeks' pay each. A breach of the information and consultation obligations is therefore a potentially expensive error.

Unlike many other tribunal awards, any compensation is based on the employee's actual gross (rather than net) pay and is not subject to a statutory cap.

Either the old or new employer can be liable to pay the compensation, or it could be split between them. See Appendix 3 for more information.

4 Employee liability information and due diligence

In addition to the information that must be given to the union or employee representatives, the outgoing employer is obliged to provide information to the incoming employer too. Any organisation buying a business, or bidding for a contract to provide services, must undertake due diligence regardless of whether TUPE applies. Employee liability information forms part of this exercise.

This information must be supplied in writing and basically details the rights and obligations of the employees who will transfer. The information must be supplied at least 28 days before the date of the transfer, although in practice it is helpful, if not essential, for the new employer to be given this information at an earlier stage.

The information includes:

- the identities of the transferring employees and their ages
- all the information contained in the transferring employees' written contracts of employment (also known as statements of particulars)
- information about any collective agreements (if any)
- details of any formal disciplinary action taken against any transferring employees in the previous two years
- details of any formal grievances raised by any of the transferring employees in the previous two years
- details of any legal action brought against the old employer by any of the transferring employees during the last two years
- details of any potential legal action that the old employer reasonably believes may be brought.

The total number of temps and agency workers working temporarily for the employer must always be expressly mentioned, including where they work and the type of work they do.

For incoming businesses, due diligence before the transfer may reveal things over and above the minimum employee liability information. For example, legal issues surrounding

whether a Christmas bonus is or is not contractual should be revealed by due diligence but may not emerge as part of employee liability information unless it is a potential legal action.

For the incoming employer it is critical to verify that the correct information in relation to the numbers of affected employees and their associated cost has been supplied.

Failure to comply

If this information is not supplied by the outgoing employer, the new employer can apply to the tribunal for compensation. This penalty is paid to the new employer but is calculated on the basis of a *minimum* award of £500 for each employee whose information was incorrect or not provided at all. There is no maximum cap, so awards can be expensive. See Appendix 3 for more detail.

Consultation

The consultation must be meaningful and conducted with a view to seeking the agreement of the union or employee representatives. Employers must respond to any representations made by the representatives, and if the employer rejects what they have to say, the employer must explain the reasons. The outgoing employer also needs to verify any measures that are being considered by the incoming employer in respect of the affected employees.

Employers should remember that information and consultation obligations in connection with redundancy only arise where 20 or more employees are proposed to be dismissed at one establishment within 90 days. By contrast, under TUPE the obligations arise if only a few employees are involved in the transfer.

The sooner the process starts, the more likely it is to be meaningful. The incoming employer should be invited by the outgoing employer to visit and speak individually with any transferring employees about the transfer and their current terms and conditions.

Consultation must cover measures the new employer is envisaging in relation to the employees. Measures include many things, for example, an entire business reorganisation, changes in pension rights and even minor adjustments such as a change of salary payment date. The consultation must be with a view to reaching agreement on the measures.

Case study

Almost a year ago Broadway took over a small commercial lettings business in Nottingham.

The business employed only two staff, Mrs Williams the office manager and a colleague; both were informed they would transfer under TUPE to Broadway. Even though there were only two employees, there had to be TUPE consultation with both of these employees (if this had been a redundancy rather than a TUPE transfer, there would have been no need for the redundancy collective consultation measures).

At the point of transfer to Broadway the previous employer paid wages for the first week of the month up to the transfer date. So the employees were paid early rather than at the end of the month, which would be the employees' normal pay day. This just happened and was not consulted on.

The Nottingham business also did not properly deduct tax and national insurance on this last week's payment, which would require adjustment at the end of the month.

While this is a trivial, minor matter, the change to pay arrangements is a measure that Mrs Williams found worrying as she was concerned about the deduction of tax.

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This is a matter that should have been included in the consultation and would in theory give grounds to a claim for compensation for failure to inform and consult about the revised arrangements.

Even very minor departures are measures within the meaning of TUPE and should be subject to formal consultation with the employees.

Broadway should have considered agreeing who should carry liability for any such failures under TUPE as part of the sale agreement.

Consultation obligations are to be taken seriously and a tribunal can award up to 13 weeks' pay per employee for a failure to consult. See Appendix 3 for more information.

The incoming employer should always check and resolve any discrepancies with the outgoing employer. The incoming employer will also need permission from the outgoing employer to consult with any recognised trade union or elected representatives about the transfer. The incoming employer may also need warranties and indemnities to cover their back if the information provided by the outgoing employer was incorrect.

Warranties and indemnities

Employers cannot get out of TUPE by 'contracting out' of the provisions. However, incoming and outgoing employers can agree to apportion risks and financial costs of TUPE between them. The usual way of doing this is by the use of warranties and indemnities, although these may be more standard in a business transfer situation; similar promises of protection may be made between businesses where there has been a service provision change.

Warranties are contractual statements by the outgoing employer as to the condition of the business. If the promise is breached, the incoming employer may be able to claim damages.

For example, a common warranty given to the incoming business is that any information the outgoing business provides about transferring employees will be full and accurate.

An example of a common warranty given to the outgoing business is that the incoming business will not take any steps towards any transferring employees that could result in any of those employees claiming constructive unfair dismissal against the outgoing employer prior to the transfer.

Indemnities are promises to pay compensation if a type of liability arises. Whereas a warrant is a promise that one company has complied with its TUPE obligations, the indemnity deals with who bears the financial consequences of the default or non-compliance.

For example, an indemnity given to the incoming business could be that any outgoing business will pay for any liability for compensation and legal costs from claims by transferring employees that were not disclosed as a potential issue in the employee liability information.

The warranties and indemnities that end up being included in any agreement will depend upon the parties' respective negotiating strengths.

The warranties and indemnities that are needed should become apparent after due diligence disclosure of information. These provisions in any transfer agreement should cover who pays for failures resulting from the obligation to inform and consult, as TUPE introduced joint liabilities for a failure to do this. The parties can agree to take joint responsibility or the old employer may agree to take sole responsibility.

5 Terms and conditions: difficulty of harmonisation

Information about TUPE often mentions post-transfer 'harmonisation'. However, this slightly misrepresents the legal position, because employees are strongly protected *against* harmonisation.

The rule is that terms and conditions must not be varied by the outgoing or incoming employer if the only or principal reason for the variation is the transfer. Rights given by statute are more important than any contractual agreements, and so employees may not 'sign away' their statutory rights. Even though any variations can appear to be agreed by the employee, the changes will still be legally ineffective.

The HR team of an employer who has acquired employees by reason of a TUPE transfer will often be asked by management at some stage to try and harmonise the terms and conditions of the new staff with the existing ones. Harmonisation by adapting the terms of transferring employees to those of existing staff is prohibited by TUPE and is always unlawful unless it falls within one of the exceptions explained below.

Case study

As mentioned above, almost a year ago Broadway took over a small commercial lettings business in Nottingham and two staff: Mrs Williams the office manager and a colleague both transferred to Broadway. They have settled in and have been working happily for Broadway until now. Broadway has just undertaken a review of the terms and conditions of all staff across the group with a view to reducing costs and harmonising terms.

Mrs Williams is quite a difficult employee anyway, despite the fact she is more highly paid than other office managers across the group. The new area manager, who has never dealt with TUPE before (without consulting HR), has identified the need for her to take a substantial pay cut. Mrs Williams has refused and, following an acrimonious exchange of emails, the area manager issued her with a new contract with the reduced terms and conditions, saying she has to take the pay cut or she will be 'made redundant'. Mrs Williams has agreed under protest to continue working on the new terms but has expressly said she reserves the right to bring an unfair dismissal claim based on her original contract. She says the new contract is unfair under TUPE and that the changes are because of the transfer.

Ava correctly advises that Mrs Williams is correct; the reason for her salary change can be traced directly to the transfer. Broadway is exposed to an automatically unfair dismissal for insisting Mrs Williams should accept the harmonised terms. Ava calculates the likely unfair dismissal award for Mrs Williams to use as a basis for negotiating a settlement agreement with her.

Exceptions when variation or harmonisation may be permissible

There are a number of exceptions to the rule that terms and conditions must not be varied by transferor or transferee, as follows:

- where the reason for variation is completely unrelated to the transfer
- where the variation is favourable to the employee
- where there is an economic, technical or organisational reason (ETO reason) entailing changes in the workforce and the employer and employee agree the variation
- when the terms of the employment contract permit variation, for example a mobility clause
- some insolvency situations
- a change to the place where employees are employed after the transfer can be an ETO reason
- if there has been a collective agreement that incorporates terms and conditions, those may be varied after more than a year from the transfer, as long as the employee's terms are no less favourable overall than they were before the variation.

ETO reasons

The main legally permissible route to implement changes to the transferred employees' contracts is to show an ETO reason. TUPE does not define this but examples are:

- **economic:** essential cost-saving requirements, for example output has fallen to such a level that the business cannot continue trading without dismissing employees
- **technical:** increased computerisation or mechanisation of activities
- **organisational:** restructuring or that it is impractical for the employees to transfer to the new business because of where it is located.

In all cases, however, the reason must also 'entail changes in the workforce', which means a change in the number of employees or in the functions that they perform.

If there is a general reorganisation of the entire workforce, the ETO definition of a reason entailing changes in workforce is more likely to be met.

Other practical options regarding changes to terms and conditions

Employers who wish to change contractual terms of the transferred staff have limited options.

Waiting

The best way to change contractual terms of the transferred staff is to wait for time to pass. The more time that passes since the transfer, the less likely the changes will be seen to be linked to the transfer. The EAT has held that the link can still be effective after at least two years though.

Case law example

In *London Metropolitan University v Sackur [2006]*, two universities merged. After two years the new university imposed less favourable terms on some of the academic staff, including Mr Sackur. The university said there was an economic, technical or organisational reason entailing changes in the workforce of the old university. The appeal tribunal held that the sole reason for the decision to dismiss the employees and offer new contracts was to harmonise all the academic staff conditions, which was related to the transfer. The fact that this was all implemented two years after the merger did not mean this was not for a reason connected with the transfer. There was grounds for an unfair dismissal claim arising out of a breach of the TUPE regulations.

Dismissal and re-engagement

Employers use this strategy in many circumstances, not just TUPE transfers. The employer terminates the transferred employees' contracts on notice and simultaneously offers re-engagement on new terms. The legal analysis of this is that there is still an automatically unfair dismissal. Many employees will want to keep their job and accept the new contracts without a fuss, but other employees who have one or two years' qualifying service may bring a claim in the employment tribunal, so this is risky.

Settlement agreements

If employees wish to leave after they have transferred under TUPE, settlement agreements can be used to prevent any future tribunal claims being brought by the employee. They cannot be used to vary transferred employees' contracts as there is not a termination and TUPE prohibits agreements that exclude or limit its operation.

Financial incentives

The incoming employer might seek to offer the transferred employees financial inducements such as a one-off payment to persuade them to agree to the contractual changes. The changes may still not be binding because of TUPE, but the employee is far less likely to bring a tribunal claim. This is a risky strategy as the employee is not prevented from bringing a TUPE claim.

Red-circling

Red-circling often occurs following a TUPE transfer. It involves freezing the pay of employees who are paid more, until their fellow employees doing equivalent work reach the same pay level.

6 Pensions

Pension provision is a complex and expensive aspect of TUPE. The starting point is that most occupational pension scheme rights are completely excluded from TUPE. Pension rights do not automatically transfer with transferring employees. Employers do have to arrange certain *minimum* pension provision under pension legislation that is separate from TUPE.

Where transferring employees are members of an occupational pension scheme (or are entitled to join one), incoming employers do not have to contribute to occupational schemes but must provide a reasonable alternative and match an employee's contributions to a stakeholder scheme up to a minimum of 6%.

The new employer should get as full a picture as possible of the pension rights of transferring employees at the due diligence stage. The exclusion from the automatic transferring of all rights that normally happens under TUPE only applies to benefits under *occupational* pension schemes. Incoming employers must check the type of scheme.

If the pension rights are not old age, invalidity or survivors' schemes, some pension obligations do transfer to the new employer. In public sector service provision situations, specific government guidance and other rules may apply as well.

7 Objecting to the transfer

Some employees may not like the look of the new employer and may try to refuse to transfer before the transfer date. If employees object in this way, their contracts simply end as they have effectively resigned and cannot claim a redundancy payment.

The outgoing employer may choose to keep objecting employees, negotiating a new contract with them, but does not have to.

If the employees are objecting because of changes to their terms and conditions that are not permissible under TUPE, they will have an automatically unfair dismissal claim.

8 Terminating employment

It is automatically unfair to dismiss employees because of a TUPE transfer. For example, on a business sale, if employees are sacked because the incoming business doesn't want some of the workforce, this would be an automatically unfair dismissal in breach of TUPE. Employees need one or two years' service to bring a claim.

The main defence for employers is that if the employer can show an economic, technical or organisational (ETO) reason entailing changes in the workforce, the dismissal will not be automatically unfair.

Case study

Broadway is also acquiring the freehold of some premises and the accompanying commercial lettings businesses with offices in Bath and Bristol. The business currently employs a team of eight staff in total, three of whom were engaged in chasing up rent and service charge payments. Broadway has better automated IT systems for chasing payments and debt recovery; there are too many employees to do the work after the transfer, and genuine redundancies are needed. One employee will be able to operate the new system and, provided Broadway follows all the correct redundancy procedures (including exploring any possible alternative roles), Liv advises it will be able to objectively select two employees for dismissal.

Even if there is an ETO reason for dismissal, all proper redundancy and dismissal procedures must be followed, and the employer must act reasonably, including attempting to find other roles within the organisation, and so on. If it is properly handled, TUPE need not stand in the way of necessary redundancies.

9 Redundancies

In the same way that employers can't just dismiss after a TUPE transfer (without being prepared to pay compensation), the incoming new employer can't just make transferred employees redundant either. Only if there is a genuine redundancy situation *and* an ETO reason involving changes to the workforce can redundancies be made after the transfer.

The new employer can start consulting about redundancies before the transfer with the old employer's co-operation. This will be unfair unless there is a clear ETO reason because of changes in the new employer's combined workforce.

A common TUPE pitfall is that, when acquiring a business, the new employer unwittingly asks the old one to 'just make some quick redundancies before the transfer'. This is because the incoming employer doesn't want the hassle of employees it does not really want. The outgoing employer may be prepared to comply in order to secure the deal it is keen to make.

The problem with pre-transfer dismissals is that to be fair there must be an ETO reason entailing changes in the workforce. The reasons must relate to the future conduct of the business. The outgoing employer might not know enough about the future conduct of the business. Therefore, the pre-transfer dismissals may be automatically unfair. Liability for any claims for premature dismissals will pass to the transferee under TUPE.

In many cases the best course of action is for the new employer to take on the transferring employees and then handle the redundancies itself. The new employer may also negotiate an indemnity for the cost of the redundancy payments. All proper redundancy procedures must be followed by the new employer, including selecting employees from an appropriate selection pool that includes employees from both the transferred and pre-existing workforce.

The new employer must apply fair and non-discriminatory selection criteria and avoid methods that give their pre-existing workforce an unfair advantage. This can be difficult where the line managers assessing staff have worked closely with one group of employees for a long time. Consulting properly with employee representatives over the proposed selection methods and criteria can help reduce perceived bias.

A note on Brexit

The UK Government enacted TUPE. Although the regulations were originally based on an EU directive, the regulations are applied differently in the UK compared with the remaining European member states.

Following the UK's vote to end membership of the EU in 2016, there has been speculation as to whether the Government will repeal or amend parts of TUPE, including the rules about changes to service provision that the UK chose to impose. Major dramatic changes seem unlikely because businesses are used to how the rules work, and there would be a significant employee backlash if market practice and protections were changed significantly.

10 Conclusion

Once a TUPE transfer is identified, both the outgoing and incoming business must respect preservation of the rights of the relevant employees. Unless there is an ETO reason, any changes to terms and conditions or dismissals because of the transfer will be automatically unfair with significant compensation consequences. Increased awards are also available where the consultation requirements were not complied with. There are serious implications for employers who misunderstand TUPE but potentially significant benefits for those employers who understand and manage it well.

11 Appendix 1: Legislation and terminology

Legislation

The main TUPE regulations were first passed in 1981 then replaced in 2006, and further amendments were made in 2014. The regulations are:

- Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246)
- Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014 (SI 2014/16).

Other relevant legislation includes the Transfer of Employment (Pension Protection) Regulations 2005.

Automatic unfair dismissal

A TUPE dismissal is automatically unfair when the sole or principal reason for the dismissal is the transfer, and it is not an ETO defence.

Business transfer

A type of relevant transfer covered by TUPE arising when all or part of a business is bought or sold involving the transfer of an economic entity that retains its identity.

Changing contractor

The organisation moves a service from one contractor to another (also known as second-generation outsourcing).

Collective agreement

An agreement between an employer and trade union covering terms and conditions, such as hours and pay.

Due diligence

The process of exploring a business usually undertaken by a potential buyer to assess the likely costs and liabilities that may result from the acquisition.

Economic, technical or organisational (ETO) reason

Such a reason entailing changes in the workforce may enable the employer to make valid changes to employee terms and conditions or to dismiss employees after a transfer in very limited circumstances.

Employer liability information

Information provided by the outgoing employer to the incoming employer about transferring employees.

Insourcing

The organisation takes activities that were previously outsourced back 'in-house'.

Organised grouping of employees

A group of employees deliberately organised by the employer to provide a service for a particular client. An employee must be part of this group in order for TUPE service provision change provisions to apply.

Outsourcing

The organisation engages a third party to carry out certain activities on its behalf.

Service provision change

A service provision change is a type of TUPE transfer where an organisation ceases to carry out some type of activity on behalf of a client, and another organisation takes over the activity. The service provision change may involve insourcing, outsourcing or a change of contractor; for example, an employer has used a cleaning company to clean its offices and decides to employ a small team of cleaners directly.

Transferor

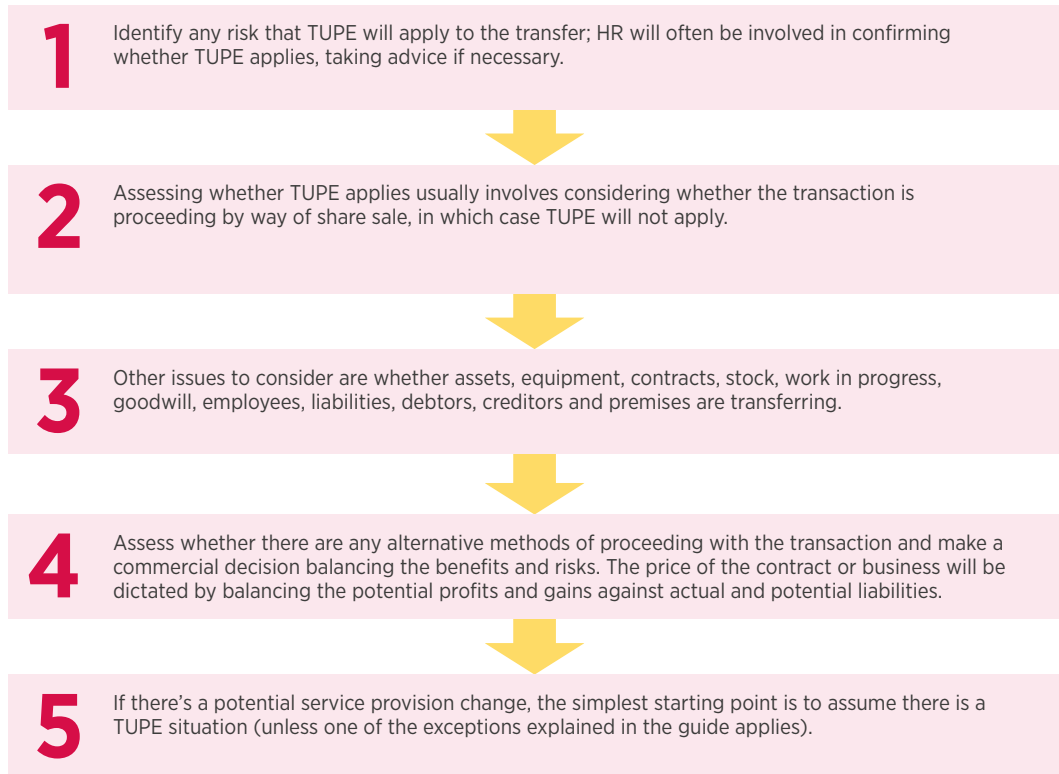
The organisation that is making the transfer (also known as the outgoing or old employer).

Transferee

The organisation that is taking on the transfer (also known as the incoming or new employer).

12 Appendix 2: Planning transfers

Identifying TUPE



Note

Employers need to deliver the commercial aims of a transfer with minimal disruption to their business for both potential business transfers and service provision changes. If the core assets of a business transfer to an incoming employer who will operate essentially the same kind of business activity, TUPE is likely to apply. For labour-intensive businesses such as cleaning, a business transfer may just involve one member of staff. Structuring a transaction differently may enable TUPE to be avoided, but employers cannot just agree that the regulations will not apply.

Early preparation

- 1 Time:** Employers must allocate realistic time management and timeframes to the transfer, for example a service provision change that involves a tender process may take many months from the initial invitation to submit tenders.
- 2 Staff:** Managers with sufficient experience and administrative support are essential. Responsibilities need allocating between available staff. In larger businesses labour will be divided between finance, IT, planning, operations HR, procurement, pensions and legal services.
- 3 The role of HR:** As part of the transfer team, HR will normally scrutinise proposals, advise on TUPE compliance and advise on the effects of staffing and workforce issues.
- 4 Cost:** All likely expenditure, liabilities, and opportunities relating to the transfer must be calculated. As well as the transaction costs there will be associated direct and indirect costs.
- 5 Employment liabilities:** In particular, employers should assess which staff are likely to transfer, and the total potential employment liabilities. If there is a risk of redundancy payments or other claims, the cost of these must be added. What are the incoming and outgoing employers' responsibilities? What measures may be needed and are they possible? Are new equipment and premises needed for transferring employees?
- 6 Softer aspects:** What is the effect on morale likely to be and how do you manage this? Keeping transferring employees and other affected staff motivated before and after the transfer is important. Will there be disruption to clients or customers? Will training or additional skills be needed for any aspects of the new business?
- 7 Draft agreement:** HR should have at least a supervisory role checking the drafting of any business transfer agreement to ensure workforce issues are addressed correctly. There must be correct information about affected employee numbers and their associated cost.

Note

The pre-transfer period, if methodically planned, helps ensure the success of the transfer. Most TUPE transfers are time-consuming; realistic management of time and resources is essential.

Engagement and documentation

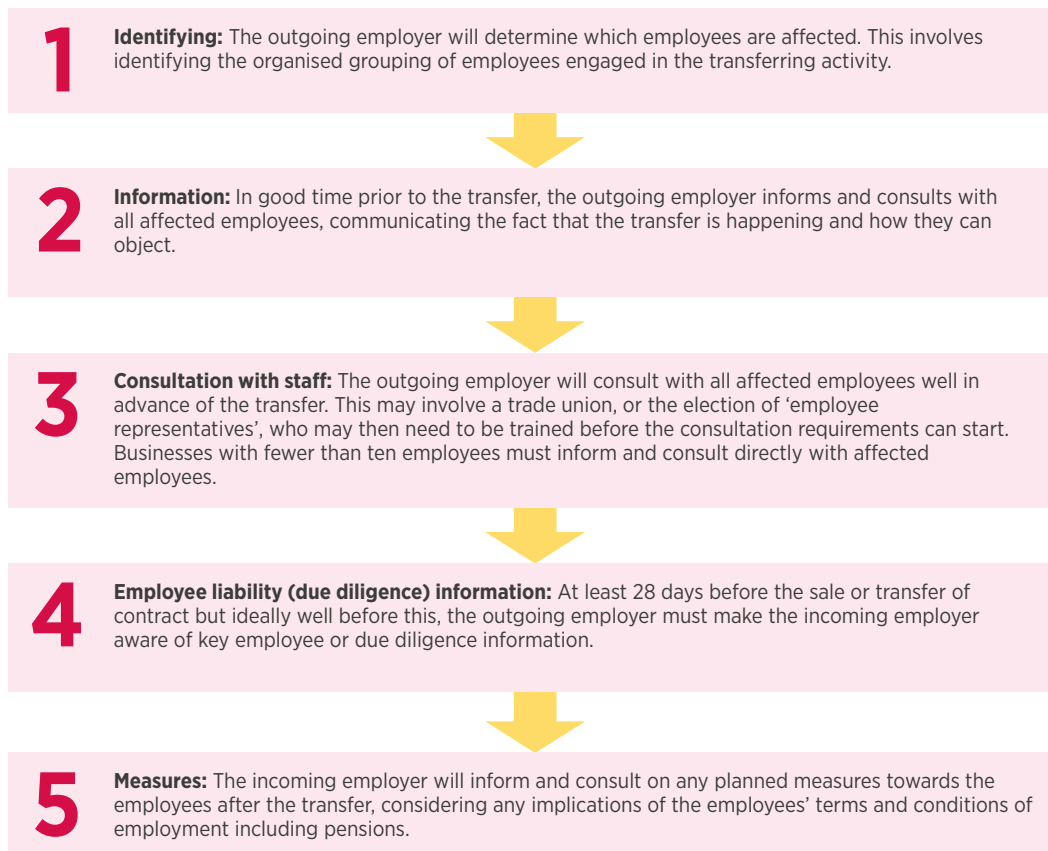


Note

There are specific legal requirements that set out the information that must be supplied during all types of TUPE transfer, both to the incoming business, the trade union representatives and/or the staff themselves. However, engagement goes beyond the legal requirements, and employees who feel involved in the process from an early stage are less likely to resist the transfer and disrupt business activity. Employee engagement is ongoing throughout the whole process, but the flowchart on page 22 shows where specific provision of information fits into the core stages.

A failure to meaningfully engage with employees encourages discontent and suspicion, increasing the likelihood of TUPE-related claims.

Heart of TUPE

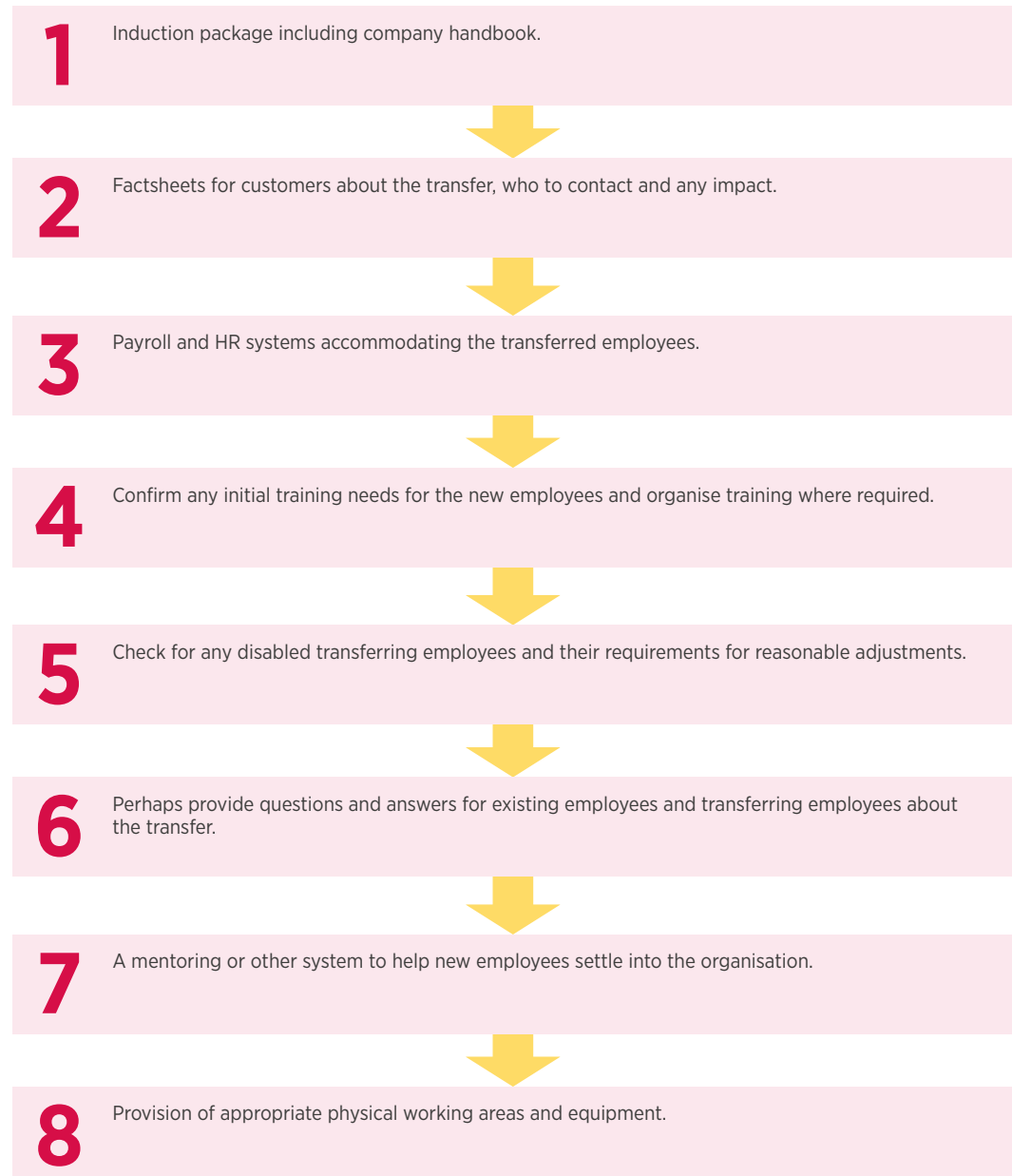


Note

The middle stage of TUPE is the most involved and encompasses many aspects. Obviously, the precise steps will vary according to whether there is a 'normal' business transfer or a service provision change and depending upon whether the employer is the incoming or outgoing employer. For more detail see the separate headings in this guide; also see the flowchart on page 21 for further detail on information and consultation.

Managing the transfer

For the transferring employees the following should be considered:



Post transfer

A post-transfer plan is necessary to monitor and assess the effect and consequences of the transfer. Following a transfer, the incoming business may experience problems assimilating two sets of employees with different history, workplace cultures, and terms and conditions. If there has been employee engagement and consultation about how relationships can be maintained during and after the transfer, difficulties may be minimised. However, there may be difficult dismissals, redundancies or attempts to change terms and conditions. Staff morale may also need proactive management.

In some situations, redundancies may be proposed, in which case consultation with representatives and affected employees and all normal redundancy selection procedures are crucial. If measures are proposed, the duty to consult with unions or representatives is ongoing.

Even if no measures or redundancies are proposed, continued employee engagement and consultation is essential to ensure that morale is preserved, and the transferred employees are successfully integrated. Customers or clients may need to meet new members of staff and may require reassurances too.

Eventually an organisational restructure may be necessary to integrate the new service and employees into the existing organisation, although changes to terms and conditions may still be subject to TUPE limitations.

13 Appendix 3: Financial exposure for TUPE-related claims

Claim	Exposure
Automatically unfair dismissal claim	The award consists of a basic award and a compensatory award. Basic award (calculated in the same way as statutory redundancy pay) is capped at £15,240, plus... Compensatory award based on the employee's gross annual salary or the statutory cap of £83,682 (whichever is lower).
Failure to provide employee liability information to the incoming employer	A minimum of £500 per employee for whom information wasn't supplied; this is payable to the incoming employer. Further compensation can be awarded to take account of any losses suffered.
Failure to inform and consult with employees	13 weeks' gross pay per employee with no maximum cap. The incoming and outgoing employer can be jointly and severally liable for any compensation awarded for failure to inform and consult.
Legal costs	For obtaining TUPE advice, defending employment tribunal claims in relation to TUPE non-compliance, plus compensation in relation to the potential liabilities listed above.



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Registered as a charity in England and Wales (1079797)
Scotland (SC045154) and Ireland (20100827)

Issued: June 2018 Reference: 7697 © CIPD

