

Unite guide for members

Transfer of Undertakings (Protection of Employment)(Amendment) Regulations 2014



A brief guide to the Transfer of Undertakings (Protection of Employment) Regulations 2006

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■ INTRODUCTION

The Transfer of Undertakings (Protection of Employment) Regulations (TUPE) was introduced in the United Kingdom in 1981 to implement the EU Acquired Right Directive. It provides some protection in the event of a transfer of the undertaking in which the employee works. The main protections are:

- (i) the automatic transfer of employment and employment obligations (except pensions)
- (ii) safeguards against dismissal and changes to term and conditions; and
- (iii) information and consultation rights.

TUPE applies to transfers of for-profit and not for-profit ventures, in (and to and from) the private and public sectors. With the prevalence of privatisation and outsourcing, and the frequent commercial desire to cut pay and terms and conditions, it has been one of the most bitterly contested areas of employment law.

In 2013, the Department of Business Innovation and Skills (BIS) carried out a consultation on proposed amendments to TUPE and the collective redundancy consultation provisions in the Trade Union and Labour Relations (Consolidation) Act 1992 ('TULRCA'). Amendments were subsequently introduced in the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014. Updated guidance on TUPE has been published by BIS.

Please note that this guide is a brief introduction to the new Regulations which are now an even more complex piece of legislation. In all cases you should contact your Unite full time official for specific guidance or help with how the Regulations apply in particular circumstances.

■ WHEN DOES TUPE APPLY?

TUPE applies in two situations, where: (i) there is a transfer of 'an economic entity which retains its identity' (Standard Transfers); and/or (ii) 'activities' cease to be carried out by one person and are instead carried out by another, these are called Service Provision Changes (SPCs). Excluded from both of these are 'transfers involving the administrative reorganisation of public administrative authorities'.

SPCs are unique to the UK, and were introduced in 2006 as a solution to problems associated with outsourcing. Immediately before the transfer, there must be an organised grouping of employees which has as its principal purpose the carrying out of the activities for the client; the client must intend that the activities after the transfer will cover more than a single specific event or task of short term duration; and the activities must not consist mainly of the supply of goods.

In its 2013 consultation, the Department for Business, Innovation and Skills (BIS) branded SPCs as unwarranted 'gold-plating' of the Directive, which should be abolished. In the face of widespread consensus from employers and trade unions that they should be retained, the government was forced to back down. From 31 January 2014, a minor adjustment was made to the requirements of an SPC – that the activities after the transfer must be 'fundamentally the same' as those before the transfer.

Further protection is provided in the public sector by the Cabinet Office Statement of Practice, which operates with the broad intention that TUPE should be treated as applying save in exceptional circumstances. Two further public sector Codes of Practice have been revoked.

■ WHO DOES TUPE APPLY TO

TUPE applies to employees permanently 'assigned' to the undertaking (or part) to be transferred. The percentage of time spent working for one part of the business is one factor, but is not determinative in isolation.

Employees do not have to transfer if they do not want to. But an employee who objects to transferring will be treated as having resigned, with no entitlement to a redundancy payment or compensation.

■ WHAT TRANSFERS?

All the rights and obligations under the employment relationship transfer. This includes rates of pay and other terms and conditions, with the exception of pension rights.

From 31 January 2014, terms derived from collective agreements are treated differently in that they are frozen at the point of transfer if the new employer is not party to the collective bargaining machinery. Only terms from those collective agreements in force at the date of transfer apply.

■ VARIATIONS TO TERMS AND CONDITIONS

From 31 January 2014, variations where the sole or principal reason is the transfer itself are void. But variations for an 'economic, technical or organisational reason entailing changes in the workforce' (ETO) are permitted if the employee agrees, or if they are permitted by the terms of the contract. 'Entailing changes in the workforce' has now been amended to include not just a change in headcount or job description, but also a change in job location.

From 31 January 2014, terms derived from collective agreements may be varied by agreement even if the reason for the variation is the transfer, provided that the varied terms take effect at least one year after the date of the transfer and the overall the varied terms are no less favourable than those applying before the variation.

The government wanted to amend TUPE to allow harmonisations to terms and conditions, but was forced to conclude that this is not permitted by the Directive.

■ DISMISSALS

From 31 January 2014, dismissals where the sole or principal reason is the transfer are automatically unfair. But dismissals for an ETO, as extended to cover a change of job location, are potentially fair.

Employees are entitled to treat themselves as dismissed if the transfer involves a substantial change in their working conditions to their material detriment. This course should only be adopted after careful advice.

■ INSOLVENCY

Employment is not transferred where the outgoing employer is the subject of insolvency proceedings opened with a view to the liquidation of its assets (compulsory liquidation or creditors' voluntary liquidation) and which are under the supervision of an insolvency practitioner. Where the outgoing employer is subject to insolvency proceedings not designed to liquidate its assets: (i) liabilities up to the maxima under the statutory protection schemes do not transfer and are instead paid from those schemes; and (ii) employers are not prevented from agreeing to 'permitted variations' to terms and conditions. 'Permitted variations' are changes to terms and conditions, where the sole or principal reason is the transfer, which are designed to safeguard employment opportunities.

■ EMPLOYEE LIABILITY INFORMATION

The outgoing employer must provide information about the employment liabilities of the transferring workforce, to include details of workers' age and identity, and details concerning disciplinarys and claims. From 31 January 2014, the information must be provided at least 28, instead of 14, days before the transfer.

■ INFORMATION AND CONSULTATION

'Long enough before the transfer to enable consultation to take place', the outgoing employer must inform the appropriate representatives of:

- (i) the fact of the transfer, the date and the reasons for it;
- (ii) the legal, economic and social implications of the transfer for any affected employees;
- (iii) the measures the outgoing employer envisages that it will take in relation to affected employees in connection with the transfer; and
- (iv) the measures the outgoing employer envisages that the new employer will take in relation to affected employees in connection with the transfer.

Affected employees are not confined to those employees transferring.

Information must now also be provided in relation to agency workers (numbers, which part of the undertaking they are working in and the type of work carried out).

If there is no recognised trade union, employers have to organise the election of employee representatives. From 31 January 2014, 'micro-businesses' (those employing fewer than 10 employees) are permitted to inform and consult directly with the workforce if no elections have taken place.

An employer which envisages taking measures in relation to affected employees in connection with the transfer must consult with the appropriate representatives. That consultation must be 'with a view to reaching agreement'.

The remedy for a failure to inform and consult is an application to the Employment Tribunal, which must be made within three months of the date of the transfer. The outgoing and new employer may be jointly and severally liable; the Tribunal may make an award of up to 13 weeks' pay to affected employees. There is a 'special circumstances' defence available if the employer can show that it was not reasonably practicable for it to comply, and that it took such steps as were reasonably necessary.

■ PENSIONS

Pension rights under 'occupational pension schemes' are excluded from transfer (but Group Personal Pension Plans are not excluded from transfer). Accrued pension rights have to be protected. There is limited protection for future service pension rights set out in the Pensions Act 2004. Benefits which are not 'old age, invalidity or survivors' benefits transfer – enhanced redundancy rights involving early payment of pension entitlement, for example.

■ PRE – TRANSFER REDUNDANCY CONSULTATION

From 31 January 2014, TULRCA is amended so that the new employer can begin consulting with appropriate representatives of the outgoing employer's workforce before the transfer takes place about collective redundancies to take effect after the transfer. The agreement of the outgoing employer is required. The incoming employer is treated as the employer for the purpose of the consultation.

■ CONCLUSIONS

In the 2013 consultation, BIS had wanted to abolish SPCs and make it possible for employers to harmonise terms and conditions. Both these initiatives were thwarted. But there are ongoing encroachments even into these fundamental areas. The scrutiny of the requirements for there to be an SPC is intensifying, detracting from their original purpose of providing a pragmatic solution in cases of outsourcing.

The 2014 changes have created a two-tier hierarchy of contractual rights, with terms derived from collective agreements being given less protection.

Whether various aspects of TUPE comply with the Acquired Rights Directive – in the areas of changes to terms and conditions, dismissals by reason of the transfer and information and consultation rights – is questioned. Likewise, it is not at all clear that the pre-transfer collective redundancy consultation rules comply with the Collective Redundancies Directive.

Particularly disturbing has been the recent pronouncement from the Court of Justice of the European Union that the purpose of the Directive is to 'balance' the interests of employers and employees. That interpretation is rejected. The purpose of TUPE, and the Directive, is and always has been, the protection of employee's accrued rights in the event of a transfer of the undertaking in which they work.

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