

Briefing on ...

The TUPE Regulations

Update 2010

The Scope of the Regulations

The Transfer of Undertakings (Protection of Employment) Regulations (TUPE) aim to protect the rights of employees when businesses change hands.

Since 2006, protection for employees transferring from one employer to another was widened to include outsourcing, re-tendering of out-sourced services and in-sourcing, collectively known as 'service provision changes'.

A service provision change involves

—an organised grouping of employees

- which has as its principal purpose the carrying out of the activities concerned on behalf of the client.'

This will often be the case were a group of members work on a contract and another provider takes over that contract.

BUT, administrative transfers, commonly following local or central government reorganisation, are exempt under TUPE, although similar protection applies under different legislation.

Rights of Employees

Any individual employed in the 'organised grouping' before the transfer automatically transfers with the business, or contract.

Under TUPE reg. 4 all terms and conditions transfer except those relating to retirement benefits. **NB.** Public sector pension provisions go beyond retirement benefits, e.g. redundancy payment rights, and these do transfer.

The new employer cannot

change terms and conditions because of the transfer, for example to harmonise conditions across the workforce.

BUT, changes can be made if there is 'an economic, technical or organisational reason entailing changes in the workforce.' (The ETO reason)

If an employer is proposing changes after a transfer, the branch should request legal advice as soon as possible.

Duty to inform and consult

Under regulation 15, both the old and the new employers must inform and consult the representatives of 'affected employees.' They must explain why the transfer is taking place;

when it will take place; what the legal, economic or social implications are' and what actions the employer might take in relation to the transfer. The employer must allow trade union access to affected

employees and provide accommodation for consultation.

If a tribunal finds that an employer has failed to consult it will issue a declaration and can

also make an award of up to 13 weeks wages for affected employees.

Collective agreements and trade union recognition

Any collective agreements that have been incorporated into individual employment

contracts are protected after the transfer. Similarly, recognition agreements transfer unless the employer can show specific exemptions apply.

Dismissal because of a relevant transfer

is automatically unfair unless there is an ETO reason justifying dismissal.

But, if an employee refuses to transfer the contract is terminated but, legally, there is no dismissal. However, if the

transfer involved a 'substantial change' for the worse to the employees' working conditions they could claim statutory constructive dismissal.

Insolvency

If the old employer is subject to insolvency proceedings then, in certain circumstances, TUPE protection does not apply.

BUT, if a new employer does not take on the workforce, employees will be due payments in respect of notice, unpaid wages and redundancy,

which can be claimed from the government.

If the new employer does take on some or all of the workforce then, even if TUPE does not apply, the employees' continuity of service is protected under the Employment Rights Act 1996.

Action for Branches

Whenever there are proposals to transfer a business, or a contract, branches should seek information on changes affecting the workforce at the earliest opportunity. Where an employer intends to make changes, relying on the ETO exemption, branches

should contact the regional organiser for further advice.

While the point of transfer is the obvious time for members to need advice, the branch can also help by keeping a record of transfers so that TUPE protection can be argued against future attempts to weaken conditions.

Further Information

Employment Rights on the Transfer of an Undertaking: A Guide to the 2006 TUPE Regulations for Employees, Employers and Representatives

Available at <http://www.berr.gov.uk/files/file20761.pdf>