**Employees: TUPE on an asset sale**

This section covers the application of the Transfer of Undertakings (Protection of Employment) Regulations 2006 to asset sales

**Introduction**

You will recall that the Transfer of Undertakings (Protection of Employment) Regulations 2006 (‘**TUPE**’) apply on an asset sale where there is a ‘relevant transfer’ i.e.:

*“a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity”. (Reg 3(1)(a))*

The sale of a business **as a going concern** will generally constitute a ‘relevant transfer’ for the purposes of TUPE.

Where TUPE applies, there is an automatic transfer of the contracts of employment from the seller (the ‘**transferor**’) to the buyer (the **‘transferee’**). The contracts continue as if originally made between the employees and the buyer – see Reg. 4(1). With some limited exceptions all rights and liabilities associated with the employment relationship also transfer. This is, effectively, a statutory novation of the employment relationship.

Remember that TUPE will **not** apply on a share sale (except in very limited circumstances which are beyond the scope of this knowledge stream). On a share sale, employees of the target company before completion will remain as employees of the target company after completion.

**Which employees are affected?**

**Regulation 4(1)**

*“A relevant transfer shall not operate so as to terminate the contract of employment of any person* ***employed by the transferor*** *and* ***assigned to*** *the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer but any such contract shall have effect after the transfer* ***as if originally made between the person so employed and the transferee****.”*

Regulation 4(1) specifically applies to **employees of the seller assigned to the business being transferred**, so employees will not transfer automatically to the buyer if they do not work in the business or part of the business being transferred.  **NB**An Employment Tribunal may lift the corporate veil for employees technically employed by another group company – see factors to take into account on the next slide.

The transfer of rights and liabilities **will not** occur if the employee informs the seller or buyer that they **object** to becoming employed by the buyer. If this occurs, the transfer will terminate the employee’s contract with the seller, but the employee will not be treated as having been dismissed by the seller and will **not** have any right to claim unfair dismissal. The employee will also not be entitled to any statutory or contractual compensation on termination (unless they object and resign either in response to a repudiatory breach by the employer or to a substantial change to their working conditions which is to their material detriment).

**How do you assess whether an employee is 'assigned' to the business being transferred?**

Where only part of a business is being transferred, or where employees work for more than one business operated by a company, employees **will not transfer** to a buyer if they are not ‘**assigned**’ to the business or part business transferred.

The court will look at an **employee’s function** rather than the terms of their employment contract to determine whether employees are wholly engaged or assigned to the business (**Botzen v Rotterdamsche Droogdok Maatschappij** [1986] 2 CMLR 50).

The Employment Appeal Tribunal has set out further guidance in the **Duncan Webb case** – **Duncan Webb Offset (Maidstone) Ltd v Cooper & Others** [1995] IRLR 633. In determining the question of whether an employee is ‘assigned’ to the business or part business transferred, tribunals should consider the following:

* the **amount of time** spent working in one part of the business over the other;
* the **value** given to each part of the business by the employee;
* **contractual terms** setting out what the employee's job comprises; and
* the **allocation of the cost** for the employee's services.

**Can sellers dismiss employees before a transfer to prevent the automatic transfer principle applying?**

Employees only transfer if they are employed in the business being sold **immediately** before the transfer.  However, if **they would have been** so employed if they had not been dismissed in certain circumstances prior to the transfer (Reg. 4(3)), the dismissal will be automatically unfair and liability for the dismissal will transfer.

The circumstances that would lead to dismissals being deemed to be automatically unfair and liability for that dismissal transferring to the buyer are set out in Regulation 7(1). This provides that if the **sole or principal reason** for an employee’s dismissal is the transfer itself, it is automatically unfair **UNLESS** the dismissal was for an **economic, technical or organisational reason** entailing a change in the workforce (‘**ETO Reason’**) (see Reg 7(2)).

ETO Reasons could include (for example) a reduction in the requirement for employees carrying on a particular function in the business.

Whether or not the sole or principal reason for a dismissal is the transfer itself is a **question of fact**. Dismissals occurring shortly before or after completion of the sale are likely to be by reason of the transfer.

It is important for these purposes to know when the transfer took effect.

If the transfer is the reason for the dismissal, then either:

1. there is **no ETO Reason** for it – in which case the dismissal is unfair and the liability for the dismissal transfers to the buyer under TUPE; or
2. there is **an ETO Reason** – in which case the dismissal is potentially fair (as a redundancy or a dismissal for another substantial reason) and liability will not transfer to the buyer.

**What rights and liabilities do not transfer automatically?**

Under TUPE the buyer inherits the transferring employees on **the terms and conditions which existed with the seller and with their continuous employment.**  The buyer also inherits **all accrued rights and liabilities under or in connection with the employment contracts** of the transferring employees: for example, an employee can sue the buyer for a breach of contract or acts of discrimination committed by the seller pre-transfer. This highlights the requirement for through due diligence.

However, TUPE does not transfer:

* criminal liabilities; or
* [the employer’s] rights and liabilities under or in connection with a contract of employment that relate to an occupational pension scheme, and which relate to benefits for old age, invalidity or survivors (Reg 10(1)). However, an employer’s liability in respect of:
  + contributions to a personal pension scheme;
  + provision of life assurance benefits;
  + certain enhanced early retirement/redundancy benefits under an occupational pension scheme

will transfer, as these are not deemed to be “old age” benefits.

**Changes to terms and conditions**

Any changes to an employment contract at any time cannot be made unilaterally and must be agreed by the **employee and employer**. If a buyer unilaterally imposes changes to terms and conditions, the employees could resign and **claim constructive dismissal.**

TUPE further restricts the changes which an employer may propose.  A change to the employee’s terms and conditions is **void** (even if the employee purports to agree with it) if the **sole or principal reason** for the variation is the transfer.

However, an employer may vary the employee’s contract if any of the following **exceptions** apply:

1. the reason for the variation is not related to the transfer;
2. the reason for the variation is an ETO Reason entailing changes in the workforce (which must involve a change in the numbers of functions of the employees) and the employer and employee agree the variation;
3. the terms of the contract permit the employer to make the variation;
4. potentially where the variation is entirely positive for the employee;
5. there are ‘relevant insolvency proceedings’ and the specified statutory conditions are satisfied (NB: this condition is beyond the scope of the knowledge stream); or
6. there is a collective agreement (these are agreements between employers and trade unions) from which the term or condition has been incorporated into the employment contract and certain conditions are met (NB: this condition is beyond the scope of the knowledge stream).

Each of exceptions 1 to 4 will be considered in turn below.

**Exception 1: The reason for the variation is not related to the transfer**

If the variation is because of the transfer but there are other reasons for the variation, then the surrounding circumstances must be considered to decide whether the sole or principal reason for the change is the transfer. For example, if the changes are part of **a wider reorganisation** which has nothing to do with the transfer, then they may be effective. There is no time period after which the changes will no longer be deemed to be connected to the transfer, so this is a continuing risk for buyers.

The government has provided some guidance on examples of circumstances which could result in changes to employee terms that are unrelated to the transfer and so would not be void under TUPE:

* the sudden loss of an unexpected order by a manufacturing company;
* a general upturn in demand for a particular service; or
* a change in a key exchange rate.

See: [A guide to the 2006 TUPE Regulations (as amended by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014)](https://assets.publishing.service.gov.uk/media/5a7ca7e8ed915d7c983bc171/bis-14-502-employment-rights-on-the-transfer-of-an-undertaking.pdf) for employees, employers and representatives (page 22).

**Exception 2: The variation is an ETO Reason**

It may be possible to vary the employees’ terms and conditions where the reason for the variation is an **ETO Reason**. However, the grounds for a valid ETO Reason have been quite restrictively defined by case law. In particular, a desire to **harmonise terms and conditions with the buyer's existing employees** (which is a common motivation for a buyer) **does not** of itself amount to an ETO Reason.

There is no statutory definition of what an ETO Reason is, but the government guidance referred to above includes examples such as:

* a reason relating to the profitability or market performance of the new employer’s business (an economic reason);
* a reason relating to the nature of the equipment or production processes which the new employer operates (a technical reason); or
* a reason relating to the management or organisational structure of the new employer’s business (an organisational reason).

It is important to remember however that there must also be a "change in the workforce".  It is therefore difficult to purport to change the terms of continuing employees.

Even if a valid ETO Reason exists, there is still the **requirement for the employee to consent to the changes.**

**Exception 3: The terms of the contract permit the employer to make the variation**

**An example** of when this would apply is if a contract already permits the employer to vary the shift times for its employees: in this case, making a change in shift times after the **transfer will not be void** under TUPE.

However, an employer cannot simply circumvent TUPE by inserting a term in the contract which gives it the ability to make changes in the future. If the sole or **principal reason for inserting that power is the transfer**, this will be caught by the general restriction and will be**void**.

In addition, note that although such a change would not be void under Reg 4(4) an employee may still be able to resign and claim unfair dismissal if there is a substantial change in their working conditions to their material detriment (Reg 4(9)).

**Exception 4: The variation is entirely positive for the employee**

TUPE does not expressly permit any variations even if they are entirely positive.  However, the government guidance referred to above states that "changes to terms and conditions agreed by the parties which are **entirely positive** are not prevented by the Regulations". Therefore, generally only detrimental or negative changes to terms and conditions (or positive changes made before the transfer – see case below) would appear to be void if they are due to the transfer itself.

**Key cases:** The Court of Appeal held in **Regent Security Services Limited v Power [2007] EWCA Civ 1188** that an employee can agree to an additional beneficial right in their contract of employment without being deprived of any rights that transfer and that this will not be void under TUPE. In this case the employee agreed with the transferee to an increase in this retirement age from 60 to 65 years  and was found to have contracted into and obtained the right to continue working to 65 years if he so wished.

In **Ferguson v Astrea Asset Management LTD [2020] UKEAT 0139-19-1505**, the Employment Appeals Tribunal found that variations agreed between employees and a transferring employer prior to a TUPE transfer, which were wholly in the employees’ favour (e.g. a new guaranteed bonus of 50% of salary), were void because they had clearly been entered into solely as a result of the upcoming transfer.

**Contractual provisions in relation to the liabilities**

The parties to a business transfer cannot prevent TUPE applying but they can share the risks involved:

1. **Schedule of employees**: Because of the uncertainty in determining which employees will transfer under TUPE and which will not, the parties will often agree a list of transferring employees. These are the employees which the parties think will transfer; they will not necessarily be the individuals who do actually transfer by operation of law under TUPE.
2. **Warranties:** The buyer will carry out full due diligence of all transferring employees’ terms and conditions because it inherits those terms and conditions on a TUPE transfer. The seller will provide warranties that all of the information is correct and accurate and that no employment claims are threatened or pending.
3. **Indemnities:** The parties will often give cross-indemnities, in order to apportion the risk of:
   1. liabilities which arise pre-transfer and post transfer; and
   2. certain employees who are not in the schedule of employees but who claim that they should transfer to the buyer under TUPE.

The standard position is that the seller picks up the cost if an employee who is not on the schedule does actually transfer by operation of law.

**The duty to inform and consult**

Regulation 13 states that both the seller and buyer must **provide information to**, and in certain circumstances **consult with**, representatives of their own employees who may be affected by the transfer or by measures taken in connection with it (‘**affected employees’**).

The government guidance referred to above lists the following examples of affected employees:

* employees who are to be transferred;
* employees of the transferor who are not being transferred to the transferee but whose jobs may be affected by the transfer; and
* employees of the transferee whose jobs may be affected by the transfer.

“Appropriate representatives” may be:

* representatives of a **recognised trade** union; or
* **elected employee representatives**. (This could  be an existing representative body with that remit or newly elected for this purpose).

Where there is a recognised trade union, the employer must consult with those representatives rather than with any other employee representatives.

Information must be given **'long enough'** before the transfer to enable any consultation to take place. This either requires the employees to be informed:

* **before the transaction** (which may have confidentiality issues); or
* there will need to be a **split signing and completion**.

The parties will also need to consider the timing for carrying out any elections to appoint representatives.

**Information**to be provided must set out:

* the fact of the transfer;
* when it is to take place;
* the reasons for it;
* the legal, economic and social implications for the affected employees; and
* whether the seller and/or buyer envisage taking any ‘measures’ in relation to the employees (or if none, to state there are no measures intended).

The buyer must inform the seller if there are any measures it is planning after completion, so that the seller can pass that information on to the seller’s affected employees.

**'Measures'** would most obviously include planned redundancies or changes to job location. However, even minor changes to an employee’s situation (for example, changing floors or using a different telephone system) are capable of amounting to ‘measures’ which could require consultation.

**Consultation** is only required if ‘measures’ are planned in relation to a party's **own affected employees**. Therefore, transferring employees of the seller will **NOT** be consulted about measures that the buyer is planning to take – only informed about them by the seller. However, in practice the employees will be consulted on all measures.

The consultation process must be carried out with a view to seeking agreement.

**Consequences of failure to comply with informing/consulting obligations**

If the information and/or consultation process is not carried out in accordance with the Regulations, the appropriate representative may bring a claim in the **Employment Tribunal**, within three months of the transfer.

A Tribunal has discretion to award up to **13 weeks’ actual pay** per affected employee (“**appropriate compensation”).**  This can obviously amount to a large amount of money, depending on the number of employees concerned.

If a claim is upheld against the **transferee**, then the **transferee will be liable** to pay the appropriate compensation.

If a claim is upheld against the **transferor**, then:

1. the transferee **may be solely liable** if the breach resulted from the transferee’s failure to tell the transferor about any 'measures' it was proposing to take; and
2. in any other case, the **transferee will be jointly and severally liable with the transferor**.

Typically, the buyer and seller will give cross-indemnities covering liabilities arising from their respective failings in the information and consultation process.

**Summary**

* The sale of a business as a going concern will usually constitute a ‘relevant transfer’ for the purposes of TUPE. This means contracts of employment of employees 'assigned to' the business immediately before the transfer will automatically transfer from the seller to the buyer.
* The contracts of the employment of the transferring employees automatically transfer to the transferee under their existing terms with certain exceptions.
* A dismissal will be automatically unfair if the sole or principal reason for it was the transfer itself (unless it is for an ETO Reason). The effect of this is that TUPE will operate to transfer the employment contract or any liability in respect of such an automatically unfairly dismissed employee to the buyer.
* TUPE restricts the changes which an employer may propose to the terms and conditions of the employment contract. A change to the employee’s terms and conditions is void if the sole or principal reason for the variation is the transfer.