

TUPE: HR guide

Introduction

The Transfer of Undertakings Protection of Employment (**TUPE**) is an area of the law which often causes a few problems for business owners, HR professionals and lawyers. It's not though as complex as people make out. The important thing is to understand the key principles and the processes required. Here are some key points.

When TUPE applies

There are two types of transfer protected under the **TUPE** regulations.

The first type is business transfers, where a business or part of a business moves from an employer to a new owner or there is a merger. There must be an economic entity, a transfer of that economic entity and the economic entity has to retain its identity following the transfer.

The second type is service provision changes. This occurs when a service provided in-house (such as answering calls, catering or cleaning) is outsourced to a contractor, or where the contract is awarded to a new contractor or where the service is brought in-house. The activities carried out before the service change must be fundamentally the same as the activities carried out after the service change and only the employees who are clearly identified as providing the service are protected.

TUPE does not apply when there is a change of the supply of goods for the business' use (for example a change of stationary supplies) or when there is a single event or short-term task (for example using caterers for a corporate event).

TUPE does not apply to a transfer of shares.

When **TUPE** applies the employees of the old employer automatically become the employees of the new employer and the new employer takes over their employment contracts. The employees maintain their continuous service and should have the same terms and conditions that they had previously. Also, the new employer is responsible for any failures of the old employer to observe the employees' legal rights. Therefore, for example, an employee could, subject to normal time limits, bring a [discrimination](#) claim against the new employer even if the discrimination occurred prior to the transfer.

Employees are able to object to transferring to the new employer. If the employee objects no notice is required and the employment ends on the transfer date.

Changing terms and conditions

A potential problem for the new employer is that their workforce will then be on different terms and conditions and employees could, for instance, be on different benefits. However, **TUPE** law prohibits employers harmonising terms for an indefinite period if the sole or principal reason for the change is the transfer. Employers can improve terms, such as increasing holiday entitlement so that employees have the same holiday rights, but any changes would have to be agreed.

The new employer is not able to make changes to the terms and conditions of employment if the sole or principal reason for the change is the transfer, unless the terms of the contract allow the employer to make the change (such as relating to a mobility clause). There is also an exception when the old employer is subject to relevant [insolvency proceedings](#) when certain variations are permitted provided conditions are met. Also, the new employer can renegotiate terms and conditions in collective agreements after one year provided the changes are no less favourable overall to the employees.

The new employer is able to change terms and conditions if the reason is an economic, technical or organisational reason (ETO) involving changes in the workforce. This could cover reasons to do with how the company is performing, the processes being used or the structure or management of the business.

TUPE and dismissal

A dismissal will be automatically unfair if the sole or principal reason for the dismissal is the transfer. If the reason for dismissal is an ETO reason the dismissal could be potentially unfair, and the employer would be required to follow fair procedures.

Employees who consider that that their terms and conditions have been substantially changed to their detriment could resign swiftly and bring a constructive unfair dismissal claim.

Employees still need to satisfy the qualifying requirements to bring a **TUPE** [unfair dismissal](#) claim.

Information and consultation

Employers are required to inform and (if appropriate) consult with recognised trade unions, or, if there are no recognised trade unions, elected employee representatives. [When an election is needed, there are certain requirements.](#)

The duty to consult only arises where an employer envisages taking measures in respect of affected employees.

The information provided to the trade union or elected representatives must be in writing and include:

- The fact that the transfer is happening, approximately when it is happening and why it is happening.
- Any economic, social or legal implications for the affected employees.
- Any measures that the employer expects it will take in respect of the affected employees (and state none if no measures are expected to be taken).
- The number of agency workers being used, which area of the business they are working in and the type of work that they are doing.

Employers with less than 10 employees do not have to elect employee representatives where there are no recognised trade unions or elected employee representatives but must inform and consult directly with the employees.

Employee liability information

The old employer is also required to provide certain information, called employee liability information, to the new employer before the transfer. The information must include:

- The name and age of the employees transferring.
- Key information about their employment.
- Disciplinary action taken against the employee in the last two years.
- Grievances raised by the employee in the last two years.
- Information relating to any collective agreements.
- Legal action taken by the employee in the last two years and any potential legal action that the employer believes may arise.

The information must be provided not less than 28 days before the transfer.

This guide is intended for guidance only and should not be relied upon for specific advice.

If you need any legal advice on **TUPE** or have other employment law queries please do not hesitate to [contact](#) me on [020 37971264](tel:02037971264)

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