

## LEGAL UPDATES AND FACTSHEETS

### TRANSFER OF UNDERTAKINGS (TUPE)

#### PREFACE:

This factsheet looks at the law surrounding the transfer of undertakings, established by *The Transfer of Undertakings (Protection of Employment) Regulations 1981 (TUPE 1981)*. It will involve an explanation of the original 1981 legislation as background information and then discuss the key legislative changes introduced in *The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE 2006)* and *The Service Provision Change (Protection of Employment) Regulations (NI) 2006 (SPC 2006)* which accompanied it.

#### TUPE 1981:

##### 1 INTRODUCTION.

- 1.1 *TUPE 1981* gave effect to the *EC Acquired Rights Directive*. The purpose of *TUPE 1981* was to protect employees when the whole or part of the business for which they work was taken over by another company, firm or individual. Where *TUPE 1981* applied, the incoming company (the transferee) takes on all the rights and liabilities associated with the employees who were employed by the out-going company (the transferor) immediately before the transfer took place.

##### 2 WHEN DID TUPE 1981 APPLY?

- 2.1 *TUPE 1981* applied if there was a *relevant transfer*. This is where an undertaking that is situated in whole or in part in the UK is transferred from one person to another. A 'person' can be a company, firm or individual.

- 2.2 A two stage test is applied in order to determine whether there is a relevant transfer:

- Whether there is an *identifiable economic entity* being carried on by the transferor.
- Whether that *entity has transferred* into the hands of the transferee.

- 2.2.1 The following guidelines demonstrate what can constitute an identifiable economic entity:

- There needs to be a *stable economic entity*. Namely, being an organised grouping of persons and assets enabling or facilitating the exercise of an economic activity which pursues a specific objective.
- The undertaking must be *sufficiently structured and autonomous*, but not necessarily have significant tangible or intangible assets.
- In labour intensive sectors, the assets are often reduced to their most basic and the activity is based on manpower alone.
- An organised grouping of wage earners who are specifically and permanently assigned to a common task may, in the absence of other factors, amount to an economic entity.
- An activity in itself is not an entity. The identity of the entity emerges from other factors such as its workforce, management of staff, the way in which its work is organised, its operating methods and, where appropriate, the operational resources available to it.

- 2.2.2 As to whether the entity has transferred, the classic test asks: *is there an identifiable economic entity that is doing essentially the same thing after the transfer as it was before the transfer?* The following factors are indicators of whether there has been a relevant transfer:

- The nature of the undertaking or business.
- Whether or not its tangible assets are transferred.
- The value of its intangible assets at the time of transfer.
- Whether or not the majority of its workforce is taken over by the new employer.
- The degree of similarity between the activities before and after the transaction.
- Whether or not its customers are transferred.
- The duration, if any, of any interruption in its activities.

2.3 **TUPE 1981** did not apply where there was:

- A genuine sale of assets only, as the identity of the economic entity will not be retained. However, **TUPE** is to be interpreted purposively and, consequently, where the intention of the sale was to avoid the effect of **TUPE 1981**, it may apply.
- A share sale, as there is no change in the actual employer.

### 3 **AUTOMATIC TRANSFER.**

3.1 Where there is a relevant transfer, the effect of **TUPE 1981** was that the transfer did not terminate the employee's contract of employment, but automatically transferred it to the transferee. **TUPE 1981** deemed the contract to have been made between the employee and the transferee. The transfer did not affect the employee's continuity of employment.

3.2 The transferee also took over all existing liability of the transferor to its transferred employees in tort and for anything done by the transferor which might result in a dismissal or discrimination based claim. Rights of indemnity under employer's liability insurance were also passed to the transferee. Criminal and vicarious liability to third parties did not transfer.

3.3 Occupational pension rights did not automatically transfer. Accrued pension entitlements did transfer, as did rights to an enhanced redundancy payment or early retirement benefits under such a scheme. Contributions to private pension schemes became payable by the transferee.

3.4 Lost share options were to be at least compensated by an equivalent provision unless genuinely separate from the employment contract.

3.5 If the employees had private medical and/or permanent health insurance cover then the transferee had to provide broadly comparable cover.

### 4 **WHICH EMPLOYEES WERE AFFECTED?**

4.1 **TUPE 1981** applied to anyone who was employed immediately before the transfer whose contract would otherwise have been terminated on transfer. That is, those who were actually employed by the business, or part of the business, which was being transferred or who spent the majority of their time working for the transferred business.

4.2 Employers could not avoid the effects of **TUPE 1981** by dismissing employees prior to completion of the transfer. The courts extended the concept of employment immediately before the transfer to include those employees who would have been employed immediately before the transfer if they had not already been unfairly dismissed for a reason connected with the transfer.

### 5 **WHAT HAD EMPLOYERS TO DO PRIOR TO THE TRANSFER?**

5.1 Before the transfer took effect, both the transferor and the transferee had an obligation to inform and consult with all employees who may have been affected by the transfer.

### 6 **WHAT IF THE EMPLOYEE DID NOT WANT TO TRANSFER?**

6.1 Employees had the right to object to the transfer of their contract of employment to the transferee. Where an employee made a clear objection concerning this, the contract of employment was terminated on transfer.

6.2 If the only objection to the transfer was the change in identity of the employer then no dismissal occurs and, consequently, no claims could be brought by the employee in respect of the termination of the contract of employment.

6.3 If the objection related to a repudiatory breach of contract (the employee can show that the change is both significant and to his detriment, an employee may resign and claim that he/she had been unfairly constructively dismissed. The claim could only have been brought against the transferor.

## 7 TRANSFER RELATED DISMISSAL.

- 7.1 What were the employee's rights? – If an employee of the transferor or the transferee were dismissed before or after a relevant transfer for a reason connected with it, the dismissal was automatically unfair. However, to make such a claim to the Employment Tribunal, the employee must still have had one year's continuous employment. An employee dismissed prior to the transfer was only unfairly dismissed if, at the time of the dismissal, a transferee had been found and the employee's dismissal was connected to the transfer under negotiation. This can be a transfer, not only that which was within the contemplation of the transferor.
- 7.2 Defence available to the employer. – The only defence available to an employer against a claim of unfair dismissal, where the employee had been dismissed in connection with a relevant transfer, was where the employer could show that the dismissal was for an economic, technical or organisational reason (the ETO defence). To be an ETO defence, the reason had to entail a change in the workforce and relate to the conduct of the business (as opposed to being designed to affect a sale or enhance the value of the business). This could include a change in the composition of the workforce or a change in job descriptions. The ETO reason must have been the actual reason for dismissal. Where such a defence was successfully put forward, the employee was then treated as having been dismissed for some other substantial reason, which is a potentially fair reason for dismissal. However, the employer still had to prove to the Tribunal that it acted reasonably and fairly, for example; proper consultation with the employee or the consideration of alternative employment for the employee.
- 7.3 Who should any claim have been brought against? – If the dismissal of the transferor's employee took place pre-transfer for a transfer related reason, liability passed to the transferee unless an ETO defence could be established. In this event, liability remained with the transferor. Liability for the dismissal of a transferor's employee on or post transfer passed to the transferee. The transferee was also liable for any dismissals of its existing employees, whether pre or post transfer.

## 8 VARIATION OF THE CONTRACT OF EMPLOYMENT.

- 8.1 **TUPE 1981** had the effect of transferring an employee's contract of employment from the transferor to the transferee in its original form. After the transfer had taken place, the pre-existing contract was treated as having been made between the employee and the transferee.
- 8.2 An actual or constructive dismissal relating to an employee's refusal to accept changes in the terms and conditions of employment is potentially fair where the employer was able to show an ETO defence. However, a mere harmonisation of terms and conditions did not entail a change in the workforce and therefore was not an ETO defence. In such a case, the dismissal was automatically unfair.
- 8.3 If an employee was dismissed and then re-engaged on new, often less favourable terms, the dismissal did take effect, but the employee was eligible to pursue a claim for compensation for unfair dismissal (whereupon it would be necessary for the transferee to establish an ETO defence).
- 8.4 A variation of terms was possible if the employee consented to the change and the employer could demonstrate that it was unconnected with the transfer or an ETO defence. However, a consensual variation would not have been valid if the reason was connected with the transfer and the employer could not show an ETO defence. In such a situation the change was legally ineffective, even if it was on more favourable terms or was accompanied by some other benefit to the employee.
- 8.5 Any attempt to change terms and conditions after a relevant transfer should have, therefore, been approached with extreme caution.

## 9 CONCLUSIONS ON TUPE 1981.

- 9.1 Where an undertaking was to be transferred, it was essential that both the transferor and the transferee had regard to the rights of all employees of that undertaking. The scope of situations which were encompassed by **TUPE 1981** was very wide and the protection for employees was far reaching. Provided that a dismissed employee was able to show that they had been dismissed in connection with a relevant transfer they would have a claim for compensation for unfair dismissal. There was no need to show that the employer acted unreasonably as the dismissal was automatically unfair.
- 9.2 There were serious financial implications for any employer who failed to fulfill the requirements of the Regulations.

## TUPE 2006 AND SPC 2006 - IN WITH THE NEW:

### 1 INTRODUCTION.

- 1.1 The previous Regulations were updated by the Department of Trade and Industry (DTI), who published [TUPE 2006](#), along with guidance (the guidance) for employers, employees and their representatives, which came into force in April 2006 and replaced [TUPE 1981](#). [TUPE 2006](#) does extend to Northern Ireland, however in a limited capacity. Therefore, the majority of the legislative changes in Northern Ireland are presented in [SPC 2006](#), which also came into force in April 2006. In the below explanation, details of which of the relevant legislations apply to which situation will be included.

### 2 WHAT TRANSFERS UNDER TUPE 2006?

- 2.1 As with [TUPE 1981](#), any employees who are employed in the business immediately before the transfer are transferred to the transferee; however, [SPC 2006](#) also transfers any liabilities relating to employees who were dismissed before the transfer for a reason connected with it ([regulation 4\(3\)](#)).
- 2.2 [SPC 2006](#) also transfers any collective agreements made with recognised trade unions and any recognition agreements where the business retains a distinct identity following the transfer.
- 2.3 [SPC 2006](#) retains the existing right of employees to object to the transfer ([regulation 4\(7\)](#)). However, [regulation 4\(9\)](#) also gives employees the right to resign and claim unfair dismissal (but not pay in lieu of notice) if the transfer involves a *substantial change in their working conditions to their material detriment*. In addition, employees can resign and claim constructive dismissal where there is a repudiatory breach of their contract.

### 3 SERVICE PROVISION CHANGES.

- 3.1 [TUPE 2006](#) extends the definition of a *relevant transfer*. However, the [SPC 2006](#) instead replaces this term with *service provision change*. Under this new terminology, the [SPC 2006](#) then extends the definition of what was a relevant transfer in [TUPE 1981](#). The definition was extended to cover:
- (As at present) a transfer of an economic entity that retains its identity (a business transfer) ([regulation 3\(1\)\(a\) TUPE 2006](#)).
  - A client engaging a contractor to do work on its behalf ([regulation 3\(1\)\(a\) SPC 2006](#)), reassigning such a contract ([regulation 3\(1\)\(b\) SPC 2006](#)) or bringing the work 'in-house' ([regulation 3\(1\)\(c\) SPC 2006](#)) unless: the contract is wholly or mainly for the supply of goods for the client's use ([regulation 3\(2\)\(b\) SPC 2006](#)); or the activities are carried out in connection with a single specific event or a task of short term duration ([regulation 3\(2\)\(a\)\(ii\) SPC 2006](#)).
- 3.2 Many service provision changes already fell within [TUPE 1981](#) and some transfers can be both a business transfer and a service provision change.

### 4 PROVISION OF EMPLOYEE INFORMATION.

- 4.1 The transferor is required to provide certain information to the transferee before the transfer takes place. These are:
- The identity and age of the employees who will transfer.
  - Information contained in the employee's written particulars of employment under [Article 33 of The Employment Rights \(NI\) Order 1996](#).
  - Information on any collective agreements affecting the employees that will apply after the transfer.
  - Any disciplinary proceedings taken against the employees or grievances brought by them in the last 2 years.
  - Any claims brought by the employees against the transferor in the last 2 years and any claims the transferor reasonably believes may be brought.
- 4.2 The information should be given not less than 14 days before the transfer or as soon as is reasonably practicable ([regulation 11\(6\) SPC 2006](#)). Once the relevant information has been provided, the transferor must provide written notification of any changes ([regulation 11\(5\) SPC 2006](#)).
- 4.3 If the transferor does not provide this information then an employment tribunal can award such amount as it considers just and equitable (having regard to the transferee's loss and any contractual terms between the transferee and the transferor) and:

- At least £500 for each employee in respect of whom the information was not provided (or was defective); or
- A lesser sum if the tribunal considers that it would be unjust or inequitable to award this minimum payment.

## 5 INSOLVENT BUSINESSES.

- 5.1 *TUPE 2006* and *SPC 2006* contain provisions which apply where the transferor is subject to insolvency proceedings that are under the supervision of an insolvency practitioner and are not with a view to the liquidation of its assets (*regulations 8 and 9 SPC 2006*): namely; an administration, voluntary arrangement and creditors' voluntary winding up. However, administrative or other receivership or members' voluntary winding up and not included in the scope of the legislation.
- 5.2 Some of the existing debts to the employees can be paid by the National Insurance Fund, rather than pass to the transferee (*regulation 8 SPC 2006*). In addition, there will be greater scope to vary employment terms subject to certain provisos (*regulation 9 SPC 2006*).

## 6 CHANGES TO EMPLOYMENT TERMS.

- 6.1 Under *TUPE 1981*, any changes to employee's terms for a reason connected to the transfer were void. Under *TUPE 2006* and *SPC 2006*, changes will only be void if the sole or principal reason is:
- The transfer itself; or
  - A reason connected with a transfer that is not an ETO reason entailing changes in the workforce (*regulations 4(4) and 4(5) SPC 2006*).
- 6.2 However, it will be possible to change employment terms before or after a transfer where the sole or principal reason is unconnected with the transfer; or concerned with the transfer, but for an ETO reason.
- 6.3 The guidance states that where an employer changes terms and conditions simply because of the transfer and there are no extenuating circumstances linked to the reason for that decision, then such a change is prompted by reason of the transfer itself. However, where the reason for the change is prompted by a knock-on effect of the transfer (say, the need to re-qualify staff to use the different machinery used by the transferee), then the reason is connected to the transfer.

## 7 DISMISSALS.

- 7.1 Under *TUPE 1981*, dismissals were automatically unfair if they were connected to the transfer and there was no ETO reason. *TUPE 2006* and *SPC 2006* identifies 3 categories of dismissal:
- Dismissals where the sole or principal reason is the transfer itself, or is a reason connected with the transfer and there *is no* ETO reason. These are automatically unfair (*regulation 7(1) SPC 2006*).
  - Dismissals where the sole or principal reason is not the transfer itself, or is a reason connected with it and there *is an* ETO reason. These are potentially fair dismissals, depending on the circumstances (*regulation 7(2) SPC 2006*).
  - Dismissals are unconnected to the transfer, where the usual unfair dismissal principles will apply.

## 8 OBLIGATIONS TO INFORM AND CONSULT.

- 8.1 Under *TUPE 2006* and *SPC 2006* the transferor and transferee will be jointly and severally liable for any failure to comply with the legislative obligations to inform and consult.
- 8.2 If there is a claim against the transferor for failing to comply with its obligations to inform and consult, the transferor may argue that the transferee's failure to provide information on its proposed measures in time caused the transferor's breach. If so, the transferor must tell the transferee that it intends to use this argument and the transferee will become a party to the proceedings (*regulation 15(5) SPC 2006*).

**9 TRANSITIONAL PROVISIONS.**

9.1 *TUPE 2006* and *SPC 2006* apply to any relevant transfer or service provision change that took place on or after 6 April 2006 (*regulation 21 SPC 2006*). Any steps taken by the transferor or transferee to inform and consult or to elect employee representatives before 6 April 2006 are treated as having discharged their duties under the regulations. However:

- The employee information does not need to be provided if the transfer took place before 19 April 2006.
- There is no obligation to inform and consult, or elect employee representatives, in relation to service provision changes (that are not also a relevant transfer) that took place on or before 4 May 2006.

**10 SUMMARY OF KEY CHANGES:**

- Extending the definition of transfer to service provision changes, that is, where services are outsourced, in-sourced or assigned to a new contractor. However, the supply of goods and 'one off buying-in of services' are excluded.
- Requiring the transferor to provide the transferee with certain information about the transferring employees, including their identity.
- Making it easier to transfer insolvent businesses to new employers.
- Enabling employers and employees to agree changes to terms of employment in certain circumstances where there is a transfer.
- Clarifying where it is unfair for employers to dismiss employees for reasons connected to a transfer.
- Making the transferor and transferee jointly and severally liable for any failure to inform and consult with the transferring employees.



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