

Briefing Note: Guide to TUPE

An Introduction to the Guide

This guide should be read by anyone who is considering buying or selling a business or part of a business, that employs any staff. It is an introductory guide and should not be relied upon as legal advice, for which you should contact us on the specifics of your situation.

The TUPE regulations - which came into force on 6 April 2006 but were recently amended by the Collective Redundancies and Transfer of undertakings (Protection of Employment) (Amendment) Regulations 2013 - were intended to simplify the law but instead created another layer of regulation for both buyers and sellers alike. If you have any concerns at all, our specialist employment lawyers, who work within our Commercial Department, will be more than happy to help.

ACAS have published a guidance on handling TUPE transfer which may provide additional assistance. The guide can be found by following this link <http://www.acas.org.uk/media/pdf/i/h/Handling-TUPE-Transfers-The-Acas-Guide.pdf>

Briefing Note June 2014

Summary:

An outline of the employment rights and obligations which arise automatically on the sale or purchase of a business

For detailed advice on all employment law matters please contact:

Paul Maynard
Partner

01323 435900
pcm@gabyhardwicke.co.uk

The protection of employment rights upon the transfer of a business is more commonly known as TUPE. This stands for the Transfer of Undertakings (Protection of Employment) Regulations 2006. The original TUPE Regulations date back to 1981 and derive from a European Directive. The purpose of the Directive and the Regulations is to protect the rights of employees when a business is transferred from one owner to another.

When does TUPE apply?

TUPE will apply when a business or part of a business is transferred as a going concern between two parties. However the identity of the employer must actually change. It does not apply when the shares in one Company are sold to another because the same Company continues to be the employer. It would also not usually apply where just the physical assets of a business are transferred, unless employees are not taken on by the new employer purely to prevent TUPE from applying. Normally there would have to be a transfer of the economic entity itself. It is not always obvious whether TUPE applies. For example, it can in some circumstances arise upon the surrender or assignment of a lease.

A controversial amendment of the Regulations in 2006 meant that a change in service provider in fields such as office cleaning, catering, security, refuse collection and machinery maintenance, became potentially covered by TUPE and meant that TUPE may apply to outsourcing, re-tendering or contracting-in arrangements, including outsourcing to a service provider situated outside of the UK. The 2013 regulations limit the ambit of what amounts to a service provision change so that TUPE will only apply where the pre and post-transfer activities are "fundamentally the same".

What is the effect of TUPE?

The effect of TUPE is that upon transfer, the new employer automatically takes over the contracts of employment of all employees who were assigned to the business or part of the business transferring immediately before the transfer itself. The transferring employees will therefore retain all existing employment rights including continuity of employment. There is a limited exception in relation to occupational pension schemes, which are beyond the scope of this guide.

Briefing Note: Guide to TUPE

The buyer also takes over all existing rights and obligations arising from those contracts of employment. This will include liability for past acts of discrimination, breaches of contract, including unpaid wages, or claims for personal injury.

If an employee is unfairly dismissed prior to the transfer because of the transfer itself or for a reason connected to it, which is not an economic, technical or organisation (ETO) reason entailing changes in the workforce, then the liability for that employee's unfair dismissal will automatically pass to the buyer. It is important to note that the ETO reason must be that of the seller and not the buyer. It follows that if an employee is made redundant to make the business more attractive for sale, or because the buyer has put the seller under pressure to dismiss staff it does not think it needs, that the dismissal will be automatically unfair and it will be the buyer who is liable for the dismissal (subject to any indemnities in the purchase agreement itself).

This could result not just in an employment tribunal awarding compensation to the employee concerned but also ordering the buyer to reinstate the employee on his original terms.

Can the terms and conditions of employment be changed?

The circumstances under which this can be done are very limited. As a general rule you cannot vary contractual terms if the reason for doing so is the transfer of the business itself, unless the variation is expressly permitted under the contract. However if the reason for the change is not the transfer itself but a reason connected with the transfer (which is not always an easy distinction to draw) you can vary contractual terms where that reason is an economic, technical or organisation reason (ETO) which entails changes in the workforce. Since the amendments to TUPE in 2013 "changes in workforce" include a change of place of work...

This is the case even if the employee concerned agrees to the change. Any such change will be void, unless it is to the employee's benefit. What amounts to an ETO reason varies from case to case but because the change must also entail workforce changes, any attempt to harmonise contracts of employment will not be permitted.

There is no guidance as to how long a buyer has to wait until it can be said that a change is no longer connected with a transfer. However, in some cases, a change two years later has still been held to be void.

You must be able to justify any changes to employment terms in such a way as to distance them from the transfer – for example an unexpected downturn in business caused by the loss of a major customer or the securing of a new contract that requires you to introduce shift working.

It is generally accepted that a consensual variation in the employee's terms and conditions of employment would be ineffective, even if carried out under the guise of a statutory compromise agreement. However, even though it has yet to be tested in court, it is widely thought that if an employee is dismissed and re-engaged on new terms, whilst settling any claim they may have for unfair dismissal by means of a settlement agreement, this would be an effective way around this issue.

Can I dismiss any of the employees?

The same rules apply, as for varying a term of the contract. The new employer cannot fairly dismiss an employee because of the transfer itself or for a reason connected with the transfer, which is not an ETO reason entailing changes in the workforce. If there is no such reason the dismissal will be automatically unfair. Even if there is such a reason you must still comply with the ACAS Code of Practice and the principles of reasonableness.

The Regulations also give rise to a statutory claim for constructive dismissal where the transferred employees have been or will be subjected to a substantial change for the worse in their working conditions, as a result of the transfer. The 'substantial change' need not be a change to the employee's contractual

Briefing Note: Guide to TUPE

terms, so the mere fact that you have the power to make a change under the employee's contract of employment may still not avail you. Furthermore, where the employee resigns in response to such a change they will be deemed to have been dismissed by the employer.

Duty to Inform and Consult

The seller and the buyer are obliged to inform and consult with recognised trade unions or elected representatives of those employees affected by the transfer. This does not just apply to the transferring employees but those left behind and those already in the buyer's business if they will be affected by the transfer. Where there are no appointed representatives to consult with the employer must organise the election of representatives and there are detailed rules that must be followed. It is only acceptable to consult directly with the affected employees themselves where the employer has less than 10 employees and is regarded as a "micro-business".

Long enough before the transfer to enable meaningful consultation, the employer must inform the employees that the transfer is going to take place, approximately when, the reasons why, the implications of the transfer for the employee and whether the new employer envisages taking any action which will affect the employer and, if so, what action. This information is not restricted to contractual information but could include details of changes to the duties or working environment of the affected employee.

If there are to be such changes, the employer must consult the staff with a view to seeking their agreement, to the new measures. Strict rules govern the consultation process, which are beyond the scope of this guide. If there is a failure to inform or consult, the affected employee may bring a claim to an Employment Tribunal against either the seller **or** the buyer. The starting point for assessing compensation in respect of such claims is 13 weeks pay per affected employee. It is common for affected employees to bring group claims before tribunals. It follows that such a group claim can have a catastrophic effect upon either the new or the old employer.

What information must be given to the buyer?

As the new employer will inherit existing liabilities it is essential that they are fully informed of these potential liabilities before they commit themselves to the purchase. The seller is required to provide the buyer with what is known as "employee liability information" which includes:

- the identity of employees who will transfer
- the age of the employees
- information contained in the Statement of Employment Particulars (see below)
- details of any collective agreements (eg with trade unions)
- details of disciplinary action taken against the employees in the preceding 2 years
- details of any grievances raised by the employees in the previous 2 years
- details of any legal action taken by the affected employees in the previous 2 years and instances of potential legal actions which may be brought where the seller has reason to believe that might occur.

This information must be provided either in writing or electronically. It should be given at least 28 days before the completion of the transfer unless special circumstances apply. However, the information must always be

Briefing Note: Guide to TUPE

given. The parties cannot agree between themselves not to comply with this duty because to do so may be disadvantageous to the employees.

Furthermore, if the seller does not comply, the buyer can complain to an Employment Tribunal which may make an award of compensation for any loss which the buyer has incurred. This could include the full value of any claim the new employer inherits. The minimum award is £500 for each employee for whom the information was not provided or each employee in respect of whom the information was defective.

What is a 'Statement of Employment Particulars'?

All employers are under a legal obligation to provide each employee with written information about their employment once they have been employed for two months. The information is quite extensive and includes for example written disciplinary and grievance procedures. An employee can be awarded compensation from a Tribunal, if they bring a claim and the employer has not provided such a statement. What seems clear from the Regulations, is that if there is no up to date statement in place in respect of each transferring employee, then an employer may run into difficulties during the sale of the business and, even if the sale goes ahead, can still be liable to compensate the buyer for non-compliance with the duty to provide 'employee liability information'.

What steps should I take?

Firstly, it is essential that you obtain advice from a specialist employment lawyer - preferably one who is regularly involved in TUPE cases. At Gaby Hardwicke our employment lawyers are integrated within our Commercial Department and have extensive experience working alongside commercial property and corporate lawyers on such transactions.

If you are selling your business or part of it, then steps should be taken at an early stage to put in place a 'statement of employment particulars' and to gather other essential 'employee liability information'. Even if you have these documents in place it is imperative that they are reviewed for compliance with current employment law. We can undertake this work for you.

If you are buying a business, then the employee liability information should be obtained and considered as part of the due diligence process.

We will also endeavour to negotiate suitable indemnities into the sale or purchase agreement so that you are properly protected from the pre-transfer breaches of contracts or statutory employment provisions. Of course, such indemnities are only worthwhile if the person giving them has adequate assets to back them up, and they should not be seen as an alternative to compliance with the Regulations.

Finally, should you need any assistance in the future, for example with the drafting of contracts or policies, advice in connection with disciplinary matters or redundancies or representation in Court or a Tribunal our employment team would welcome the opportunity of discussing your requirements with you.

If you would like to know more about this topic or our other legal services, please contact Paul Maynard on 01323 435900 or email pcm@gabyhardwicke.co.uk

Gaby Hardwicke Solicitors

33 The Avenue
Eastbourne
East Sussex
BN21 3YD

Tel: 01323 435900
Fax: 01323 435901
info@gabyhardwicke.co.uk
www.gabyhardwicke.co.uk