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TUPE: What you need to know

What is TUPE?

The Transfer of Undertakings (Protection of Employment) Regulations (commonly known as TUPE) derive from a European Directive and were first passed in 1981, updated in 2006, and further amendments were made in 2014. This guide explains an employer's obligations under the Regulations in the context of selling or buying a business as the Regulations apply to any business that employs staff.

TUPE is designed to protect employees if the business in which they are employed changes hands by ensuring their terms and conditions are upheld under that new employer.

If you are considering buying or selling a business or part of a business, a good understanding of the Regulations is essential to protect your business from claims.

When does TUPE apply?

TUPE applies in the following situations:

- **Business transfers**

  TUPE will apply regardless of whether the business in question is a small, independent coffee shop or a large company with numerous offices nationwide.

  Where a business or part of a business is being transferred as a going concern from one employer to another, the Regulations will be applicable. TUPE may also arise in less obvious situations where a lease is surrendered or assigned.

  Note the actual identity of the employer must change. As a result, TUPE does not apply where the shares in one business are sold to another as the business continues to be the employer. It also would not apply where only the physical assets of a business are transferred unless the new employer does not take on employees.

- **Service provision changes**

  TUPE may also be applicable in circumstances where:

  - Service is provided in-house (cleaning, workplace catering) and is given to a contractor.
  - A contract ends and is given to a new contractor.
  - A contract ends, and the work is transferred in-house by the former customer.

Practical implications of TUPE

Once the transfer between the seller and buyer completes, the seller's employees have a legal right to be transferred to the new employer on their existing terms and conditions with all their existing employment rights and liabilities intact.

Put simply, the new employer steps into the shoes of the old employer, and the employee's employment contract takes effect as though it was always made with the new employer.

For this reason, it is crucial that new employers have as much information as possible about all the employees of the seller, as the buyer will take over any existing rights and obligations under those employment contracts. This extends to any liability for previous acts of discrimination, breaches of contract or claims for personal injury.

Dismissals and providing an economic, technical, or organisational (ETO) reason

Dismissals will automatically be considered unfair, where the main reason for dismissal is the transfer itself or for a reason connected with the transfer.

However, an ETO reason may not automatically be unfair:

- Economic reasons are to do with how the company is performing.
- Technical reasons are to do with the company's equipment and processes.
- Organisational reasons are to do with the structure of the company.

Therefore, an ETO reason must entail changes in the workforce relating to workforce numbers or job functions. Under the 2014 changes, an ETO reason also covers dismissals for a change in workplace location.

Note an ETO defence is narrow in scope, and even if you can provide such a reason, it must comply with the ACAS Code of Practice and the principles of reasonableness. As a result, it can be difficult to use.

Changing terms and conditions of employment

A new business employer may be tempted to change the terms and conditions of its newly gained employees. Still, as mentioned above, the new employer is required to take on the employees with their existing terms and conditions of employment.

The same rules for dismissals apply in that changes to terms and conditions of employment are prohibited where the sole or principal reason for the variation is the transfer.

However, TUPE 2014 has introduced changes which potentially make it easier for employers to effect changes to terms and conditions where:

- The existing contract permits a change to be made (for example, the application of a mobility provision in the contract).

- The employer and employee agree to the change in circumstances where the sole or principal reason for the variation is an ETO reason.

Otherwise, an attempt to change terms and conditions will be void unless it can be proved that it is to the advantage of the employee.

Waiting period

So exactly how long must a buyer wait until it can safely be said that changes are unrelated to the transfer?

Unfortunately, there is no set time limit, and each case will rely on its own facts. However, the more time that has elapsed, the less likely the transfer will be found as the culprit. To be able to justify changes, therefore, it is crucial to isolate reasons from the transfer.

Importantly, any change to terms and conditions of employment will need to be negotiated and formally agreed. If there is a recognised trade union, then negotiations will have to take place with the union.

As a new employer, you may also want to look out for a clause in the employee's contract that allows employers to make certain changes unilaterally. This may (depending on the wording of the clause) enable a new employer to make changes without the need for negotiation.

Duty to inform and consult

Before a transfer of ownership takes place, employers are obligated to inform and consult with the trade union or employee representatives.

This includes the transferring employees and those left behind or already in the buyer's business. If there are no appointed representatives, the employer must organise the election of representatives. It will only be acceptable to consult directly with the affected employees where a business has less than ten employees.

Nevertheless, employers are under an obligation to inform employees:

- That the transfer is happening, when it is happening and why
- How they will be affected by the transfer
- Of any reorganisation

Failure to do so can result in the employer being penalised.

Information that must be disclosed to the buyer

It has already been mentioned that a new employer inherits all existing liabilities under the employee's contract.

This also extends to any oral or customary terms that are not on paper. A new employer, therefore, might find themselves responsible for honouring a Christmas bonus agreement, although there is no mention of it in writing!

Therefore, due diligence is crucial here, and the seller is required to provide 'employee liability information,' which includes:

- The name of the employees
- The age of the employees
- The main details of employment
- Any disciplinary action that was taken against employees in the last two years
- Any grievances raised by employees in the last two years
- Any legal action taken by the employees against the employer in the last two years
- Any potential legal action that the employer thinks the employees might raise.

This information must be provided, either in writing or electronically, to the buyer at least four weeks prior to transfer. Note this requirement is not optional; the parties are not permitted to agree to leave this information out as this would be a disadvantage to employees.

Additionally, if the seller fails to provide the employee liability information, the buyer may complain to an Employment Tribunal, where compensation may be awarded for any loss the buyer has incurred.

Points to consider before buying or selling a business and action to take

Whether you are buying or selling, advice from an employment or commercial solicitor must be obtained to ensure full compliance with TUPE.

Sellers must:

- Inform and consult the Trade Union, employee representative or employees directly so they are fully aware of what is happening and how they will be affected.

- Provide employment liability information in a timely manner to avoid incurring penalties.

Buyers must ensure they:

- Undertake due diligence with respect to the information provided by the seller, ensuring all risks and liabilities are fully disclosed.

- Recognise that any attempt to dismiss an employee or to change terms and conditions must be TUPE compliant – in other words, do you have an ETO reason?

SO Legal can assist sellers and buyers in understanding their obligations under TUPE and ensure the transfer goes through smoothly.