TUPE

Employment Implications of Business Transfers and Service Provision Changes 2014/2015
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Introduction

The Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") continue to catch out the unwary HR professional as the Regulations and caselaw evolve and undermine previously long-held beliefs about the boundaries of the Regulations.

Complications continue to arise from the fact that TUPE applies to a wide variety of situations such as transfers of businesses and services, including changes to service providers and outsourcing arrangements.

TUPE applies by operation of law whether or not the parties want it to, which in turn can lead to unintended consequences and liabilities arising.

The purpose of this note is to set out guidance on the potential for TUPE to apply and the implications which arise if it does. It also sets out commercial and practical guidance.

The government undertook a “call for evidence” on the effectiveness of TUPE in November 2011. Following a consultation period, changes were made to TUPE and the Trade Union and Labour Relations (Consolidation) Act 1992 in January 2014. Where relevant, the changes are highlighted in this note.

As with any generic note, this is no substitute for specific advice on particular issues which may involve your business. As ever, we would be delighted to assist you with these should they arise.

Do check with one of the team for the latest position.

November 2014.
Overview

The Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") contain far-reaching rules for the protection of employees' rights on the transfer of a business or outsourcing.

The purpose of TUPE (which replaced the previous version of the regulations which were introduced in the 1980s) is to give effect to the UK's obligations under EC law to implement EC Council Directive 77/187 (otherwise known as the "Acquired Rights Directive") which is designed to provide protection to employees when the business in which they work is sold or transferred.

TUPE applies in the event that a business or undertaking is transferred from one party (the "transferor") to another (the "transferee") or in the event that there is a change in the party providing a service, provided that the applicable conditions and requirements are met.

If TUPE applies, the employees will transfer automatically together with associated liabilities. TUPE gives rise to certain obligations to inform and consult and to provide employment information, for which there are penalties for non-compliance.

Employees are also afforded enhanced protection in the event that they are dismissed or an attempt is made to vary their terms and conditions of employment in connection with a TUPE transfer.

Any agreement to exclude or limit the application of TUPE is invalid. TUPE applies by operation of law, notwithstanding any agreement to the contrary in any commercial arrangement.

That said, it is usually possible to deal with or avoid some of the implications of an application of TUPE, whether by procuring that employees object to a transfer or enter into compromise agreements, or otherwise by virtue of a commercial agreement between the parties which deals with the potential liabilities which arise.
When does TUPE apply?

TUPE applies either where there is:

- a transfer of a business (or an identifiable part of a business) which is situated in the UK immediately before the transfer ("Business Transfer"). This test, the constituent elements of which are elaborated upon below, would cover, for example, the sale of a division of a company by way of an asset sale; or

- a change in the identity of a party providing services ("Service Provision Change"). This test, which is elaborated upon in the section ‘Service Provision Changes’ below, would cover outsourcing arrangements.

TUPE can apply to the transfer of all, or part, of an undertaking or business. Case law has established that the relevant part must be a self-contained and severable economic unit.

In addition, the assets making up that part must be sufficiently grouped to constitute an economic entity in their own right, that is, they should be assigned to the performance of the objectives of that economic entity;

- a transfer of that economic entity

TUPE permits that a transfer can take place by one or a series of transactions (whether or not between the same parties). There is no requirement that the series of transactions must be close to each other in time. The courts will look through complex arrangements and determine whether there has been a transfer by looking at the substance of what has happened; and

- the economic entity retains its identity following the transfer

The two tests are by no means mutually exclusive. TUPE will apply even if only one of the tests is satisfied. However, TUPE does not apply to the transfer of shares, unless the transfer of shares is coupled with a TUPE transfer, for example as part of a post-completion reorganisation.

Business Transfers

A Business Transfer will occur where there is:

- an economic entity

This is defined as "an organised grouping of resources that has the objective of pursuing an economic activity, whether or not that activity is central or ancillary".

By way of example, there will be no TUPE transfer if an administrative function undertaken by staff manually is replaced by an entirely computerised function.
In assessing whether there has been a Business Transfer, all the factual circumstances must be considered, but particularly relevant factors include:

- whether tangible assets (such as buildings and moveable property) are transferred;
- the value of intangible assets at the time of the transfer;
- whether the majority of the workforce is taken over by the new employer;
- whether customers are transferred;
- the degree of similarity between the activities carried on before and after the transfer; and
- the period of time (if any) for which the activities of the business are suspended (e.g. where the business is closed for a refit).

The importance of the various factors depends on the nature of the business. For example, the most important factor in relation to labour intensive businesses (such as security firms) will be whether the majority of the workforce has been taken over. In asset-intensive businesses (such as bus companies), the key factor will be whether the physical assets are transferred. In either case, the courts will carefully consider the reason why any assets or employees have not transferred and in particular whether the parties are attempting to circumvent TUPE.

Service Provision Changes

Service Provision Changes concern relationships between contractors and their clients who contract to hire their services. The change to these contracts can take three principal forms:

- where a service previously undertaken by a client is outsourced;
- where a contract is assigned to a new contractor on subsequent re-tendering; or
- where a contract ends and the service is brought in-house by the client.

TUPE only applies to changes in the service provision which involve “an organised grouping of employees… which has as its principal purpose the carrying out of the activities concerned on behalf of the client.” However, the provision of “one-off” services (such as a one-off PR event) is excluded.

The activities carried out before and after the transfer must be fundamentally the same in order for TUPE to apply. Minor differences will be disregarded. If there is a change of client as well as a change of service provider, the service provision change test will not be met, although the transfer may still fall within TUPE under the business transfer test.
Fragmentation

In certain circumstances, parties have successfully argued that there has been no TUPE transfer when the service has been transferred to numerous parties, for example, an advice line where calls are distributed between the incoming contractors in a random manner, in circumstances when it is unclear which transferee will be undertaking the relevant activity. This is more commonly known as “fragmentation”.

Public sector transfers

TUPE is stated to apply to public and private undertakings engaged in economic activities whether or not operating for profit. However, it specifically provides that a reorganisation of a public administration or the transfer of administrative functions between public administrations is not a relevant transfer. TUPE would however cover transfers from the public to private sector.

Cross-border issues and off-shoring

TUPE applies even if:

- the transfer is governed or effected by the law of a country or territory outside the UK;
- the service provision change is governed or effected by the law of a country or territory outside the UK;
- the affected employees’ employment is governed by any such law; or
- the transfer of a business (which may also be a Service Provision Change) involves employees who ordinarily work outside the UK, provided that the undertaking (for the purposes of the Business Transfer rules) is situated in the UK, or the organised grouping of employees (in the case of a Service Provision Change) is situated in Great Britain, immediately prior to the transfer.

Prior to the decision of the Employment Appeal Tribunal (“EAT”) in Holis there was much debate as to whether TUPE applied to transnational transfers (or outsourcings), either to a country within the EEA to which the Acquired Rights Directive applies, or elsewhere. This uncertainty reflected the fact that the Acquired Rights Directive does not expressly address the issue of cross-border transfers.

However, the EAT clarified the issue holding that TUPE has the potential to apply to a transfer of a business from the UK to a country within, or even outside, the EU. The decision has a particular bearing on outsourcing arrangements where services are transferred overseas, which is more commonly known as “off-shoring”.

Although it is unclear how the case will be interpreted in the context of such an arrangement, the likelihood is that the incoming contractor will become responsible for employees and associated liabilities, including the cost of any redundancies in the UK.

This gives rise to certain practical difficulties, such as in relation to any obligation to consult collectively in respect of any redundancies, as it
is arguable that this should occur after the transfer has taken place but before any redundancies take effect and the incoming contractor may not have premises or the staff in the UK to enable it to conduct collective redundancy consultation. There are various strategies which can be adopted to deal with these considerations.

From January 2014 the government has amended the Trade Union and Labour Relations (Consolidation) Act 1992 so that collective consultation in a TUPE context may be undertaken by the transfer or prior to the transfer, which may help with some of the practical difficulties outlined above.
Automatic transfer of employment

Where TUPE applies, individuals who are employed by the transferor immediately before the transfer and who are assigned to the business, undertaking or service that is being transferred (see ‘Who transfers’ below) will automatically become employees of the transferee from the time of the transfer on the same terms and conditions that they previously enjoyed with the transferor (save in relation to occupational pension arrangements), and with their continuous service for statutory purposes preserved.
Who transfers?

TUPE applies to any employees who are “assigned” to the transferring business, undertaking or service. Whether an individual is “assigned” is essentially a question of fact, taking into account a number of factors, including the percentage of time spent working in the undertaking being transferred – although this is by no means the only factor that will be taken into account.

The question as to whether the individual is assigned will be assessed having regard to the relevant factors immediately before the transfer.

In turn, there may be scope on the part of the transferor (in accordance with the terms of the employment contract) to assign employees away from the business, undertaking or service (which may make it harder to continue to provide the applicable function) or, alternatively, to assign too many employees to the function, which could lead to a redundancy situation following the transfer.

There is nothing to stop the transferor offering to rehire the employees on or following a transfer, unless there is some express contractual arrangement in place which prohibits such conduct.

Prior to a TUPE transfer, it is important to check whether any staff are employed by a third party contractor (such as cleaning staff), who may also transfer with the business, undertaking or service.

However, TUPE does not apply to any employees who are only temporarily assigned to the organised grouping. Whether an assignment is “temporary” will depend on a number of factors, including the length of the assignment and whether a date has been set for the employee’s return or re-assignment to another part of the business or undertaking.

Service Provision Change

In the context of a service provision change, there must be an organised grouping of employees which has as its principal purpose the carrying out of the activities concerned. Employees must be deliberately organized by reference to the requirements of the client in order for them to transfer. Only then should you go on to consider whether an individual employee is assigned to the services.

Right to object

Employees have a right to object to the transfer of their employment under TUPE by informing either the transferor or transferee. If they do exercise this right then their employment is treated as ending automatically by operation of law and they are not treated as having been dismissed by either the transferor or transferee (and will not therefore be entitled to any notice or severance pay). It is advisable to ensure that employees are aware of the implications arising from such an objection.
What liabilities/benefits transfer?

With certain exceptions (such as criminal liabilities, occupational pension arrangements (see ‘Occupational pension arrangements’ below), responsibility for PAYE obligations and certain exclusions which apply in insolvency situations (see ‘Insolvent businesses’ below)), the transferee will inherit the transferor’s rights, powers, duties and liabilities in relation to the transferring individuals.

This means that anything done or omitted to be done by the transferor in relation to those individuals (such as a breach of contract or failure to abide by discrimination laws) is treated as having been done by the transferee.

Of particular note:

- **Liabilities for personal injury**

  Liabilities for personal injury or disease arising from the employment with the transferor will transfer under TUPE. However, in order to counterbalance this risk, the courts have found that the benefit of the transferor’s compulsory employers’ liability insurance cover will also transfer.

- **Restrictive covenants**

  The benefit of restrictive covenants will transfer to the transferee under TUPE, although covenants will be construed in a (sensible) purposive manner after the transfer to take account of the fact that there has been a transfer and that the individuals are no longer part of the transferor’s business.

  Difficulties arise where there are no existing covenants, or their terms are inappropriate, on the basis that any changes to such terms may be rendered void – see ‘Variation of terms and conditions’ below. This is the case even though the employees may have received additional consideration for the covenants.

  One tactic sometimes used by employees is to object to a transfer with a view to preventing the transferee inheriting the benefit of their restrictive covenants, and in turn preventing the application of them.

- **Stock options and share schemes**

  It has been held that rights to participate in a profit sharing scheme with a share-based element do transfer, although most schemes have pre-existing rules which provide that the scheme will automatically come to an end in such circumstances.

  Where arrangements are found to transfer, the difficulty is that no two schemes are the same, and a smaller business could rarely match the scheme of a large public company. If replication is not realistically possible, the transferee need not match the scheme word for word, but must provide something substantially equivalent. The same...
principle applies to staff discount arrangements which cannot be easily replicated by the transferee.

■ Collective agreements

Any collective agreements relating to the transferring employees will transfer to the transferee. This is partly by virtue of the fact that often such collective rights are incorporated into employees’ individual contracts of employment, and so transfer in that way. In addition, TUPE contains separate provisions which provide for collective agreements (and trade union recognition agreements – see below) to be transferred to the transferee on completion of the relevant transfer. It should be noted that TUPE only transfers the effect of collective agreements in respect of employees whose contracts of employment are transferred; therefore employees who are hired by the transferee after the transfer will not be covered automatically by the transferred collective agreement.

In respect of transfers which have occurred since January 2014:

(i) TUPE does not transfer rights under collective agreements which are negotiated or come into force after the transfer where the transferee is not a party to the collective bargaining for that provision; and

(ii) transferees who find themselves subject to terms which have been collectively agreed may vary those terms provided that the variation takes effect more than one year after the date of the transfer and the rights and obligations in the relevant employee’s contract are, when considered together, no less favourable than before the variation.

■ Trade Union recognition

TUPE provides that where an independent trade union is recognised to any extent by the transferor in respect of transferring employees, then the union is deemed to be recognised by the transferee to the same extent.

However, this recognition only applies where the transferred organised grouping of employees “maintains an identity distinct from the remainder of the transferee’s undertaking”. Therefore, if the transferred workforce becomes integrated into the new employer’s workforce following the transfer, union recognition will not be deemed to have been transferred. Note that notwithstanding this, any collective agreements may still continue to have effect.

It may therefore be possible to avoid the transfer of union recognition if the transferee merges the acquired undertaking (or part) with its existing workforce. Alternatively, if recognition does transfer, the transferee could take steps to withdraw recognition. Neither course, however, would be without potential industrial relations risk.
Dismissals

TUPE provides enhanced protection against unfair dismissal over and above general unfair dismissal law. Any dismissal of an employee with at least two year's service will be automatically unfair where the sole or principal reason for the dismissal is the transfer itself unless there is an economical, technical or organisational reason ("ETO reason") entailing changes in the workforce.

Accordingly, if the transfer has no bearing on this dismissal, the enhanced protection will not apply.

There is no specific "safe" period after which dismissals definitively will not be because of the transfer itself. However, the greater the time between the dismissal and the TUPE transfer, the greater the possibility of arguing that there is no connection between the two. Each case will be decided on its own facts.

Further, where the enhanced dismissal protection applies to a pre-transfer termination of employment, liability for the automatic unfair dismissal will transfer to the transferee.

ETO reason

While there is no statutory definition of an ETO reason, the Tribunals have held that the reason must be concerned with the day-to-day running of the business. The government has published guidance which states that an economic, technical or organisational reason is likely to include:

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

The ETO reason must also entail changes in the workforce. This means that it must relate to changes in the numbers, functions and/or levels of employees, including a change of place of work.

A request by the transferee for the transferor to dismiss employees before the transfer will not normally be regarded as an ETO reason, and it is advisable that such collusion is avoided. Further, even if the transferee would have an ETO reason, the transferor cannot rely on it to dismiss employees prior to the transfer.

Underlying unfair dismissal rules

If the dismissal is not by reason of the transfer itself or the dismissing employer establishes an ETO reason, then the mainstream law on unfair dismissal under Employment Rights Act 1996 will still apply (see our Guide to UK Employment Law for further information).
Substantial changes to working conditions

In addition to the enhanced protection arising in relation to dismissals (see ‘Dismissals’ above), transferring employees who find that there has been or will be a “substantial change” for the worse to their working conditions as a result of the transfer may have the right to terminate their contract and claim unfair dismissal. An employee who resigns in reliance on this right cannot make a claim for notice pay in the event that they do not work out their notice period.

It should be noted that a substantial change to working conditions and the resulting right to resign may arise notwithstanding that there is no breach of contract.

However, variations of employment contracts are not void even if the reason is the transfer itself, provided that it is an ETO reason or the terms of the contract permit the variation.
Variation of terms and conditions

It is common for employers to want to harmonise the terms and conditions of any employees who transfer to them under TUPE with those of its existing workforce. Any such changes which are detrimental to the employee will be regarded as automatically void if the reason for them is the transfer itself unless the employer has an ETO reason entailing changes to the workforce (for further information about what constitutes an ‘ETO reason’, please see ‘Dismissals’ above).

TUPE does not impose any limitations on the ability of an employer to make changes to terms and conditions where the reason for these changes has nothing to do with the transfer. Normal Contractual and Constructive unfair dismissal principles would still apply though. The rules relating to variations are also relaxed in certain insolvency situations (see ‘Insolvent businesses’ below).

Consequences of changes being rendered void

If an employer does attempt to vary terms and conditions of employment because of the transfer itself, and such new terms are rendered void, the courts have held that the employer cannot enforce the terms which are to the employee’s detriment but the employee may be able to retain any benefits. In essence, this means that the employee will effectively be able to choose whichever pre-transfer or post-transfer terms are more favourable to them.

Effecting a change to contractual arrangements

Some employers have tried to dismiss employees prior to a TUPE transfer, therefore enabling the transferee to argue that, with effect from the transfer, the employees had no existing terms and accordingly the transferee was free to agree new terms of employment after the transfer.

This approach was accepted as an effective termination of employment by the House of Lords, although the approach would give rise to obvious downsides in that the employees could bring a claim for automatic unfair dismissal. However, it may still be possible to deal with such risk by arranging for the employee entering into a legally binding settlement agreement, although this approach has never been fully tested in the courts.

For transfers occurring after January 2014, employers are able to vary terms of employment contracts which are incorporated from a collective agreement following the transfer, provided that the change takes place more than one year from the date of transfer and the contract is no less favourable to the employee (see ‘Collective Agreements’ above).
Employee liability information

TUPE requires the transferor to provide the transferee with certain information about the transferring employees (the "employee liability information") not less than 28 days before the relevant transfer takes place. The aim of providing this information is to give the new employer time to understand their obligations towards the transferring employees.

The transferor must provide all information in writing. This can be in the form of electronic files as long as the new employer can access the information. The information can be provided in stages, subject to the deadline.

Information to be provided

The information that must be provided is:

- the names and ages of the employees who will transfer;
- their statements of employment particulars, setting out all the information required by s.1 of the Employment Rights Act 1996;
- details of any collective agreements that apply;
- details of any formal disciplinary action taken or employee grievances raised in the past two years to which a relevant Acas code of practice applies; and
- instances of any legal actions against the transferor in the past two years by the transferring employees and any potential legal actions.

If any of this information changes before the transfer is complete, the transferor must provide details of the changes in writing to the transferee.

Consequences of non-compliance

If the transferor does not provide employee liability information, the transferee can make a complaint to an employment tribunal. This could lead to a compensatory award of an amount which the court considers is just and equitable in all the circumstances having regard to any loss the transferee incurs due to not having the information (bearing in mind that the transferee is under a duty to mitigate his loss). Compensation is usually at least £500 per employee affected.

Need for additional warranty protection

The difficulty with the regulations dealing with employment liability information is that the information must only be provided a short period before the transfer. This is not particularly helpful when a change of contractor is being contemplated in an outsourcing scenario as it would be difficult for any prospective contractor to price the employment aspects of the contract until it has received the information, which leaves little time for the contractual arrangements to be completed before the transfer takes place.

It is therefore particularly important in any outsourcing or similar arrangements that provisions are included in the commercial agreement between the parties to ensure that the information is provided at an earlier stage, and that the information is backed up by a warranty to ensure that it is complete and accurate in all material respects (see 'Contractual arrangements between the transferor and transferee' below).
Information and consultation requirements

Both the transferor and the transferee have an obligation to inform and (if appropriate) consult with “appropriate representatives” (see ‘Information and consultation requirements’ below) in relation to any of their own employees who may be affected by the transfer or any measures taken in connection with it.

Certain information must be provided to the appropriate representatives long enough before the transfer to enable consultation to take place. Although the duty to inform will arise in every TUPE transfer, the duty to consult only arises where an employer envisages taking measures in respect of affected employees.

Determining who the affected employees are

The obligation to inform and consult is only in relation to any “affected” employees, who are “any employees of the transferor or the transferee (whether or not assigned to the organised grouping of resources or employees that is the subject of a relevant transfer) who may be affected by the transfer or may be affected by measures taken in connection with it”. This would not include, for example, employees who would not be affected by the transfer unless they were to make a job application to that department.

Appropriate representatives

Where an employer recognises a trade union, it must inform and (if appropriate) consult representatives of that union. The employer is not required to inform and consult any other employee representatives in such circumstances, but may do so if the trade union is recognised for one group of employees but not for another.

Where no trade union is recognised, the employer must inform and consult either existing employee representatives or new ones specially elected for the purposes of the transfer. If there are existing representatives, their remit and appointment must give them suitable authority to participate in such discussions.

There are detailed regulations concerning the election of employee representatives for these purposes, and their functions and responsibilities. The employer must allow the appropriate representatives access to the affected employees and provide the representatives with such accommodation and other facilities as may be appropriate.

Employers with fewer than 10 employees can inform and consult directly with the employees if there are no existing appropriate representatives.

The obligation to inform

Timing

The appropriate representatives must be informed about the transfer (and any measures) long enough before the relevant transfer to enable consultations to take place with appropriate representatives of the
affected employees. This is rather vague, but the Acquired Rights Directive suggests it means “in good time”. There is no minimum prescribed time limit, and much depends on the extent of any changes which are likely to take place.

What information is to be given?

TUPE provides that the following information must be given to the appropriate representatives:

- the fact of the transfer, the (approximate) date when it is to take place and the reasons for it; and

- the legal, economic and social implications of the transfer for the affected employees. What is meant by “legal, economic and social implications” will be a question of fact in each case; and

- the measures which the employer envisages it will take in connection with the transfer in relation to “any affected employees” or, if no measures are to be taken, that fact. The term “measures” has been held to have the “widest scope”, covering any “action, step or arrangement” taken in connection with the transfer; and

- the transferor must also provide to the representatives information about any measures that the transferee envisages it will take in relation to the transferring employees in connection with the transfer or, if the transferee envisages taking no measures, that fact. The transferee has an obligation to provide the information to the transferor in time to allow the transferor to perform its obligations.

How should the information be given?

This information must be delivered to each of the appropriate representatives (for example in a consultation meeting), or sent by post to an address that they have provided to the employer or (in the case of representatives of a trade union) sent by post to the union at its head or main office. While TUPE does not require the information to be provided in writing, case law suggests it would be good practice to do so. Any information given to employees or their representatives must be accurate.

The obligation to consult

An employer who envisages that he will take measures in relation to an affected employee, in connection with the relevant transfer, must consult the appropriate representatives of that employee with a view to seeking agreement to the intended measures.

TUPE requires the obligation to consult to be more than simply giving the appropriate representatives the opportunity to air their views: it must be with a view to seeking their agreement to the relevant measures envisaged. In practice, this means that the employer must negotiate in good faith over all areas of the proposed redundancies or the measures it intends to take.
Penalty

A failure to comply with these obligations exposes the parties to a claim for compensation of up to 13 weeks’ uncapped pay, for which the transferor and the transferee may, in certain circumstances, be held to be jointly and severally liable.

A claim for such a penalty can generally only be brought by the appropriate representatives, within three months of the transfer.

A number of cases have suggested that the maximum penalty should be applied unless there is good reason not to, although more recently the courts have been looking at the extent and nature of the failure before determining the amount of the penalty.

Given that responsibility for the penalty may pass to the transferee, it is generally advisable for the transferee to ensure that such possibility is dealt with appropriately in any contractual arrangements between the parties (see ‘Contractual arrangements’).

Special circumstances defence

An employer has a defence to a failure to inform and consult claim if it can show that there were special circumstances making it not reasonably practicable for information to be given or consultation to take place, and that it had done the best it could do in the circumstances.

The special circumstances defence has been applied extremely narrowly, for example covering an immediate and unexpected collapse of a business which gave rise to a transfer. It does not cover the need to protect commercial confidentiality, in respect of which the courts expect employers to endeavour to enter into confidentiality arrangements with the appropriate representatives.

However, in one case the court found that a rapid sequence of events, imminent deadline and possibility that a transaction may collapse were special circumstances making it not reasonably practicable to consult about a measure which arose shortly before a transfer. It remains to be seen whether this more liberal approach will be followed by other cases.
Insolvent businesses

In order to facilitate the rescue of failing businesses, the fundamental TUPE employment protections are relaxed in cases where the transferor is insolvent.

The extent of these modifications depends on the nature of the insolvency proceedings to which the transferor is subject. In general, more significant employment protections are removed where the transferor is subject to terminal insolvency proceedings which aim to liquidate the transferor’s assets.

Bankruptcy or analogous proceedings

For example, where a company is the subject of bankruptcy or any analogous insolvency proceedings which have been instituted with a view to liquidation of the assets of the company and are under the supervision of an insolvency practitioner, the employees will not automatically transfer to the acquiror and any dismissals will not be automatically unfair.

Relevant insolvency proceedings

By contrast, where a company is the subject of “relevant insolvency proceedings” which comprise “proceedings which have been opened in relation to the company not with a view to the liquidation of the assets of the company and which are under the supervision of an insolvency practitioner” (including administration) then (although employees will transfer and benefit from unfair dismissal protection), in order to make the business more attractive to a potential purchaser, liability for certain sums will not transfer to the transeree.

TUPE also gives greater scope to vary employees’ contracts where there are relevant insolvency proceedings including administrations. However, any changes must be agreed with appropriate representatives and the changes must be made with the aim of safeguarding the employment opportunities by ensuring the survival of the business, undertaking or service.
Occupational pension arrangements

Pension benefits

Any rights, powers, duties and liabilities that relate to non-occupational pension schemes such as personal pension schemes, will transfer. For example, if the transferor makes a contribution of 5% of salary to an employee’s personal pension scheme, the transferee will be required to replicate this.

Liabilities of the transferor relating to employees’ rights and benefits under occupational pension schemes do not, as a rule, transfer to the transferee under TUPE. However, where transferring employees have occupational pension schemes with the transferor, the transferee does not escape any responsibility relating to pensions. The transferee must make available for eligible transferring employees a minimum level of future pension benefits after the transfer. In these circumstances, the transferee has an option as to whether to provide a defined benefit (e.g. final salary) scheme or a defined contribution (e.g. money purchase) scheme.

The pension exception does not apply to other benefits under an occupational pension scheme which are not age, invalidity or survivors’ benefits. This means that any terms dealing with redundancy or certain early retirement benefits may still transfer. These are known as “Beckmann” rights. Typically a transferee will seek indemnity protection in respect of liabilities transferring as a result of any Beckmann rights.
Contractual arrangements

Consideration should be given to dealing with the following aspects in any contractual arrangements:

- The provision of information so as to ensure that it is provided in good time before the transfer and that it is complete and accurate in all material respects;

- The identity of employees who will transfer, including mechanisms to deal with:
  - Steps to be taken by the transferor prior to the transfer, which may involve:
    - Ensuring that there are no changes to staffing arrangements prior to the transfer so as to preserve the status quo; or
    - Assigning employees to or from different parts of their business so as to ensure that they do or do not transfer. Note that such steps need to be permissible in accordance with pre-existing contractual arrangements;
    - The potential that not enough employees will transfer – which is typically dealt with by giving the transferee the opportunity to offer employment to any individuals who did not transfer;
    - The potential that too many employees will transfer – which is typically dealt with by either:
      - The transferor offering to re-employ the individuals and then the transferee terminating the employment – on the basis that the offer of employment should help mitigate any unfair dismissal liabilities; or
      - The transferee terminating the employment with the cost of such terminations being dealt with in the commercial agreement between the parties;
    - How transferring employment liabilities (such as for any failure to inform and consult or in relation to potential discrimination claims or similar claims) are to be addressed. The typical approach is a straight split between liabilities accrued pre-transfer and those accrued post-transfer, subject to certain variations;
    - The apportionment of employment costs. Again, the typical approach is a straight split between costs incurred pre-transfer and those incurred post-transfer, although more sophisticated arrangements may need to be adopted to deal with holiday pay and certain incentive arrangements;
    - Transferor providing consent to any required redundancy consultation commencing prior to the transfer;
    - Any benefits which cannot be replicated by the transferee;
    - Any third-party contractor staff who may transfer; and
    - The pension aspects.
Outsourcing arrangements involving a subsequent transfer

Outsourcing arrangements give rise to additional complexity from a commercial perspective as there is likely to be a subsequent transfer to either a new service provider or back to the client at the end of the arrangement.

In arrangements of this nature, it is important that the client includes appropriate provisions in the commercial arrangements to deal with a potential transfer at the end of the arrangement, which can be overlooked as parties often prefer to concentrate on the initial transfer at the outset of the contract.

Difficulties often arise on a second generation outsourcing if, for example, there are no (or inappropriate) contractual arrangements dealing with the provision of information at a reasonably early stage before the transfer at the end of the contract so as to allow the services to be retendered properly or there is no (or inappropriate) protection dealing with costs and liabilities which may pass to the incoming contractor.

In the absence of appropriate clauses being included in the contract between the outgoing contractor and the client, the incoming contractor may have no option other than to seek an indemnity from the client to cover such liabilities (even if the client may not have back-to-back protection from the outgoing contractor) or to simply try to price for such risks, which inevitably may make the price quoted by any prospective incoming contractor unattractive from the client’s perspective – which in turn may mean that the client becomes stuck with the incumbent contractor even though the service is not being performed particularly well.
Our Team

The Kemp Little LLP employment team has an established reputation for expert, pragmatic and user-friendly assistance on all employment-related matters.

We understand the need to deliver commercial, efficient, timely and cost-effective advice to our clients, and have considerable experience helping them manage risk and implement strategic projects from a human resources perspective.

The team advises on all aspects of employment law, including:

- transactional support and outsourcing;
- reorganisations and redundancies;
- dispute resolution, including advice on avoiding disputes and defending claims; and
- business immigration.

“‘The team has a ‘clear understanding of business’ and offers ‘practical, sensible advice linked to a commercial reality’"

Legal 500

“‘They’re modern and forward thinking; they feel more like colleagues than contractors.’"

Chambers Guide

“This ‘vibrant practice’ is noted by clients for its ‘flexible, prompt, creative advice, provided at a reasonable cost’. Clients particularly value the group’s employment workshops and seminars, which help them keep abreast of changing legislation in this sector.”

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David Williams
Head of Employment
Tel: (+44) (0) 20 7710 1641
david.williams@kemplittle.com

Kathryn Dooks
Partner
Tel: (+44) (0) 20 7710 1660
kathryn.dooks@kemplittle.com

Virginia Allen
Senior Associate
Tel: (+44) (0) 7710 1654
virginia.allen@kemplittle.com

Elizabeth Marshall
Associate
Tel: (+44) (0) 7710 1616
elizabeth.marshall@kemplittle.com

Anna Byford
Associate
Tel: (+44) (0) 7710 1665
anna.byford@kemplittle.com

Amy Douthwaite
Associate
Tel: (+44) (0) 20 7710 1622
amy.douthwaite@kemplittle.com

Ben Bradburn
Associate
Tel: (+44) (0) 207 710 1679
ben.bradburn@kemplittle.com

Naomi Sansom
Associate
Tel: (+44) (0) 207 710 1603
naomi.sansom@kemplittle.com