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TUPE regulations

members' guide

experts at work



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introduction



On 31 January 2014, new regulations on the Transfer of Undertakings (Protection of Employment) – known as TUPE – came into effect. These regulations updated the TUPE 2006 regulations which were designed to safeguard employees' rights when a business or organisation transfers to a new employer.

The regulations are relevant to Prospect members in both the private and public sectors. Takeovers, mergers and insolvency in the private sector, and a massive programme of privatisation and contracting out in the public sector have increased in the last 20 years.

Prospect and other unions have campaigned to ensure that employees' rights are protected as far as possible in the event of a change of employer. Prospect has successfully represented members' interests in situations where TUPE has applied and will continue to do so.

TUPE's basic principle is that employees transfer with their work and their jobs are protected. However terms and conditions including pay, benefits, allowances and collective agreements negotiated by trade unions may now be subject to change. These changes are summarised in this guide.

This guide does not cover all the legal aspects and complexities of TUPE. The law in this area is constantly developing, changing and being tested in the courts.

Check the latest news at www.prospect.org.uk/help-at-work/support-advice/transfers-tupe.

For more detailed advice, please contact your Prospect full-time officer.

acquired rights directive

1

1.1 The Transfer of Undertakings (Protection of Employment) Regulations were designed to implement the European Acquired Rights Directive (ARD) of 1977.

1.2 The aim of the directive is to provide for 'the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded'.

1.3 The directive has three core principles:

- contracts of employment are automatically transferred
- protection against dismissal
- a duty on the employer to consult representatives.

1.4 The original 1981 TUPE regulations fell short of the requirements of the directive. Since then, the government has made major changes to make them more compatible with the directive. Case law has also clarified their implementation.

TUPE regulations 2014

1.5 The Transfer of Undertakings (Protection of Employment) Regulations 2014 made several detrimental changes to the earlier regulations.

1.6 Transfers that occurred before 31 January 2014 are still subject to the 2006 TUPE regulations. Transfers that occurred on or after 31 January 2014 are subject to the 2014 regulations.

1.7 This guide deals with the current regulations. If the transfer in your case happened before 31 January 2014, please note that the rules were different and seek specific advice from Prospect.

enforcing rights

1.8 Rights under the regulations can usually be enforced through an Employment Tribunal – for example, claims for unfair dismissal,

changes to terms and conditions or lack of consultation. Such claims must usually be commenced within three months of the infringement or dismissal. The first stage is to make an application to ACAS for early conciliation. In many cases, a written grievance should be presented to the employer before making a claim to the tribunal.

1.9 Always consult your Prospect representative as soon as possible. Please note that Prospect's rules state that legal advice and assistance is offered at the discretion of the union and will be decided on an individual basis depending on the merits of the case.

when TUPE applies

2

2.1 The regulations apply where an undertaking, or part of one, is transferred from one person or organisation to another, or where there is a change of service provider.

an undertaking

2.2 The first factor in determining whether TUPE applies is to identify the undertaking. The regulations define an undertaking as including any trade or business. Case law has given this a broad interpretation and most forms of employment are covered.

2.3 TUPE applies equally to the public and private sectors and an undertaking can be part of a private or public sector organisation.

2.4 To be covered by the regulations, the undertaking must be situated in the UK immediately before the transfer. Members should seek advice if there is an international dimension to the transfer.

a transfer

2.5 The second test is to determine whether there has been 'a relevant transfer' of the undertaking.

2.6 The transfer can be by 'sale, some other disposition, or by operation of law'. For example, some other disposition would cover contracting out and a privatisation may be enacted by law. TUPE does not apply where there is a transfer by share acquisition – ie where shares change hands in a limited company.

2.7 TUPE applies regardless of the number of staff involved. For example, in one case TUPE applied when a bank contracted out the cleaning of one branch which was previously done by one person. The European Court of Justice ruled that TUPE applied, even though there was only one employee.

2.8 The transfer may consist only of the provision of services and need not necessarily involve a transfer of assets, such as buildings or equipment. For example, TUPE applied when a car dealership passed from one franchisee to another, even though no assets were transferred.

2.9 TUPE will usually apply in the following circumstances:

- privatisation
- contracting out
- management/employee buy-outs
- change of a contract for service provision
- second round contracts
- contracting back in-house
- change of lease or license
- commercial purchase.

2.10 The European Court of Justice has ruled that a relevant transfer is a transfer of staff or a transfer of tangible or intangible assets (eg goodwill or know-how).

service provision changes

2.11 TUPE will usually apply in situations where a contract for a service expires and it is either contracted back in-house or transferred to another contractor.

2.12 TUPE regulations apply in the following situations:

- a client outsources to a contractor
- a new contractor takes over activities from another contractor
- a client takes activities back in-house from a contractor.

These types of transfer are called service provision changes.

2.13 The regulations state that for TUPE to apply, the activities being done before and after the transfer should be 'fundamentally the same'.

2.14 For there to be a transfer of a service provision, there must be no change to the identity of the client commissioning the services before and after the change in service provider.

knowledge of the transfer

2.15 TUPE will apply even if the individual employee does not know that the transfer has occurred.

retaining identity

2.16 The decisive factor in determining if there has been a relevant transfer is whether the entity in question retains its identity after the transfer. Factors to be considered include:

- the type of undertaking or business involved
- the transfer or otherwise of tangible assets such as buildings and stocks
- the value of intangible assets (including goodwill)
- whether or not the majority of staff are taken on by the new employer
- the transfer or otherwise of the transferor's customers
- the degree of similarity between the activities carried on before and after transfer
- the duration of any interruption of those activities.

2.17 Not all these factors have to be present. The courts have stressed that the existence or absence of any one or more of these factors is not conclusive either way.

2.18 A helpful question to determine if there has been a relevant transfer is whether the jobs previously done by the group of employees still exist. If the answer is yes, and there has been a transfer of staff or assets, the undertaking is likely to have been transferred.

2.19 Examples where TUPE has applied to Prospect members include:

- the many successive changes of employer in the electricity sector following the privatisation of the utility companies
- BT's sale of parts of telecommunications work to smaller private companies
- privatisation and outsourcing of work done by civil service departments or agencies.

2.20 TUPE does not apply in all situations, and its application is determined by the courts. For example, a contract to finish work on a company canteen building was held not to be covered by TUPE because it did not involve the transfer of a stable economic entity and was limited to finishing one piece of work.

who is transferred?

3

3.1 All those employed 'immediately before the transfer' are protected by TUPE.

3.2 Employees dismissed for a reason connected to the transfer will also be covered by TUPE.

assigned to the work

3.3 Once a relevant transfer is identified, all the employees are covered by TUPE and should transfer with their work. Problems can arise where only part of an organisation is being transferred and the employee is not dedicated solely to one part or the other.

3.4 Employees often work in different parts of an organisation – one that is being transferred and one that is not being transferred. The courts have said that those employees 'assigned' to the work being transferred will be covered by TUPE.

working abroad

3.5 The regulations cover employees who 'ordinarily work outside the UK' to the extent that their contracts of employment will transfer. Such employees will not, however, be covered by the provisions relating to unfair dismissal and the employer's duty to inform and consult representatives.

effects of TUPE

4

4.1 TUPE means that if there is a transfer of undertakings, employees' contracts are transferred to the new employer.

what transfers

4.2 After the transfer is completed, all the transferor's responsibilities in connection with contracts of employment transfer to the new employer.

4.3 The new employer has to take on all existing contractual terms. These include expressly agreed and implied terms, such as:

- pay
- allowances
- hours
- redundancy entitlement
- holidays
- sick pay arrangements.

4.4 Where it is not possible to transfer a contractual term to the new employer, for example, a profit sharing scheme, the new employer must offer a scheme of 'substantial equivalence'.

4.5 Full pension rights do not transfer under TUPE (see Section 5). Redundancy payments, however, are covered by TUPE and will transfer to the new employer, even where they are linked to pension provisions.

4.6 Union recognition agreements also transfer to the new employer (see Section 10).

4.7 Liability for past breaches of contract also transfers to the new employer. For example the transferee will be responsible for arrears of pay that accrued before the transfer. Liability for accidents at work should also transfer.

4.8 Employment between the two employers will be continuous. In calculating the length of continuous employment, years with the transferor will be added to time with the transferee.

4.9 See Section 10 for advice about changes to contracts after the transfer.

opting out

4.10 Employees and employers cannot agree to opt out of the protection that TUPE affords. For example, a clause stating that contracts of employment would not transfer, even though there was a relevant transfer, would be void. Likewise, a clause stating that the new employer refuses to recognise the employee's previous continuity of service would also be void.

4.11 Contracts of employment pass automatically to the transferee on the date of transfer, even if the employer and employees intend differently. It is not open to the parties to postpone the date on which the contracts transfer.

pensions

5

5.1 Occupational pensions do not fully transfer under the TUPE regulations.

5.2 Where an employee had an occupational pension with the old employer, the new employer had to provide minimum pension provision. The new employer does not have to provide the same type of pension scheme offered by the old employer. The regulations require that:

- the value of the benefits provided by the transferee's scheme must be at least 6% of pensionable pay for each year of employment, in addition to any contributions made by the employee, or
- the scheme must provide for the new employer to make 'relevant contributions' to match employee contributions, subject to an upper limit of 6% of basic pay.

As a result it is possible for new employers to offer defined contribution pension provision to employees who previously enjoyed a defined benefit scheme before they were transferred.

5.3 There are extra protections that go beyond the minimum requirements of the TUPE regulations for employees who are transferred from the public sector (or when employees who were previously transferred from the public sector are subject to second or later generation transfers as a result of retendering). The government's advice in its Statement of Practice on staff transfers in the public sector is that there should be 'appropriate arrangements to protect occupational pensions'. The detail of how this works is at www.gov.uk/government/publications/fair-deal-guidance.

5.4 An employee compulsorily transferred from the public sector into the private sector should retain access to their public sector pension scheme, while directly employed on the work that was transferred – this can be complicated so members should seek advice from their Prospect negotiator.

5.5 Members who were employed in the electricity industry before privatisation are covered by the Protected Persons Regulations. These place a duty on employers, even where there has been a TUPE transfer, to maintain pension provision that is equivalent to that available before privatisation. Some members who joined the electricity industry after privatisation may enjoy protection conferred under the scheme rules. The regulations and scheme rules are complex and members are strongly advised to contact Prospect if they have any difficulty with this.

5.6 Members who were employed in the nuclear industry and satisfy the conditions set out in the Energy Act 2004 enjoy protections for pension provision on transfer equivalent to those enjoyed by members working in the electricity industry on privatisation. The regulations and scheme rules are complex and members are strongly advised to contact Prospect if they have any difficulty with this.

5.7 Introduced in October 2012, auto-enrolment was gradually phased in up to 2018. Where an employee changes employer as a result of a transfer, the new employer is responsible for assessing the worker with effect from the transfer date and where appropriate, automatically enrolling them. In effect, they are treated as a new joiner for that employer.

changes to terms and conditions

6

6.1 TUPE gives employees the same rights they would have had if there was no change of employer. Strictly speaking, employment contracts cannot be changed without the agreement of the employee. However, if a change does occur, the legal remedies are often unsatisfactory. A strong union presence is essential to ensure workers' rights are protected.

6.2 Variations to contractual terms will only be void where the reason for the variation is the transfer itself.

6.3 Contractual variations will be permitted where there is an economic, technical or organisational ('ETO') reason.

6.4 The regulations also allow for variations where the reason for the variation is the transfer itself but the terms of the contract permit the employer to make such a variation.

6.5 If an employer unilaterally changes terms and conditions of employment, employees may be able to take legal action. If there is a financial loss they may sue the employer, or in some cases they may resign and claim constructive dismissal. The law in these situations is complicated so always seek detailed advice from your Prospect full-time officer.

6.6 Terms and conditions incorporated from collective agreements may be renegotiated after one year provided that the change is agreed and overall the contract is no less favourable to the employee. This only covers the part of an employee's terms and conditions that are covered by a collective agreement. Other changes are subject to standard TUPE protection.

6.7 Under the regulations, it is clear that any change to the collective agreement after the transfer will not be effective for the workers who have transferred.

challenging a variation of contract

6.8 There is no set time limit for TUPE protection and challenges to variations because of the transfer may occur well after the transfer. In general, the further the challenge is from the date of transfer, the harder it is to prove the link.

6.9 Because legal rights are often inadequate and the law does not always protect employees against changes to their contracts, it is important that local union organisation is strong. Prospect has successfully resisted the imposition of worse terms and conditions by many organisations during transfers.

refusal to transfer

7

7.1 The law says no-one can be forced to work for a different employer against their will, so an employee can object before the transfer takes place.

7.2 If the employee objects to the transfer, they do not have the right to remain with the old employer and will be deemed to have resigned. The employee will not be treated as having been dismissed and will have no right to claim redundancy or unfair dismissal.

7.3 There is an important exception. Claims for unfair constructive dismissal can be brought if the employee objects to the transfer in response to a substantial change in their working conditions to their material detriment and treats the employment contract as having been terminated.

7.4 An employee can object to the transfer by informing the old or new employer and the objection must be lodged before the transfer. It is not possible to transfer 'under protest'. The only exception is where employees do not know the transferee's identity until after the transfer date.

7.5 Employees considering an objection should be cautious before acting and should always seek advice from their Prospect full-time officer.

7.6 Prospect tries to negotiate preference schemes that enable staff to choose between redeployment, transfer or redundancy. But there is no legal right to a choice.

unfair dismissal

8

8.1 It is automatically unfair to dismiss an employee because of the transfer.

8.2 If an employee is dismissed before or after the transfer and the reason (or principal reason) for dismissal is the transfer itself, the dismissal will be automatically unfair.

8.3 If the employer can establish that the employee was dismissed for an 'economic, technical or organisational reason entailing changes in the workforce', it will not be automatically unfair. This may be the position where business reorganisation is necessary. But as in other unfair dismissal cases, the usual tests of reasonableness would apply.

8.4 Under the regulations, dismissals resulting from a change of workplace will not be automatically unfair (as they will be covered by an economic, technical or organisational reason).

unfair dismissal claims

8.5 Employees can only claim unfair dismissal if they have been continuously employed for two years or more.

8.6 The compensation that a tribunal can award for unfair dismissal is limited. The current (2019) maximum compensatory award is £86,444, or 52 weeks' pay (whichever is lesser). The maximum basic award is £15,750. Average awards are much lower – the median award for unfair dismissal in 2017/18 was £8,015.

equality at work

9

9.1 Rights and agreements under equal opportunities provisions should be protected under TUPE like other terms and conditions of employment. Equality provisions that are a contractual right of individual employees will transfer to the new employer.

9.2 Equality provisions can transfer in two ways:

- individual contractual rights will transfer like any other term of the contract. For example, rights to parental leave, or extended periods of leave for visiting family abroad
- collective agreements between the employer and the union will transfer, eg equal opportunities or harassment policies.

9.3 It can be difficult to establish whether an equality policy has become a contractual term. For example, a procedure for carrying out a disability audit of premises is unlikely to be incorporated into individual contracts of employment and therefore may not transfer (unless it is part of a collective agreement). But a contractual entitlement for time off to observe religious holidays would constitute an individual term and should transfer.

trade union agreements

10

recognition agreements

10.1 The TUPE regulations state that where the transferor recognises a trade union for collective bargaining, the recognition agreement will transfer to the new employer.

10.2 The recognition agreement will only continue to apply where the undertaking maintains a distinct identity after transfer. If the undertaking is integrated into an existing business that does not recognise trade unions, the original recognition agreement may no longer be protected by the TUPE regulations. Prospect will work with members and representatives to ensure trade union rights are protected in the new organisation.

Prospect may be able to use the statutory recognition provisions if the new employer does not recognise trade unions.

collective agreements

10.3 Collective agreements are defined as any agreement or arrangement made between trade unions and the employer on a range of matters, including:

- terms and conditions of employment
- engagement or termination of workers
- allocation of work
- discipline
- membership or non-membership of a trade union
- facilities for trade union representatives
- negotiation or consultation procedures.

10.4 Examples of collective agreements are:

- redundancy agreements
- equal opportunities agreements
- pay agreements.

10.5 Collective agreements between unions and employers are not usually enforceable in law. But any part of an agreement that is incorporated into an individual contract of employment can be enforced by the employee. For example, pay arrangements and redundancy payments that are included in a collective agreement will usually be incorporated into individual contracts.

10.6 Collective agreements that are in place at the time of transfer will transfer to the incoming employer. Many collective agreements continue indefinitely, while some cover specific periods. The 2014 regulations reflect a recent court decision that collective agreements pass to the incoming employer (the 'static approach'), which mean the incoming employer is:

- still bound by the collective agreement in force at the time of transfer, but
- no longer bound by changes negotiated and agreed by the outgoing employer after the date of transfer where the incoming employer is not party to the process.

10.7 The pay structure of the transferor may continue to apply after transfer. If employees are entitled to pay increases negotiated under the terms of a collective agreement, this may be revisited by the employer one year after the transfer as long as there is agreement and the terms are no worse overall.

information, consultation and union membership

11

11.1 TUPE regulations require incoming and outgoing employers to:

- inform/consult elected representatives of the affected workforce before the transfer; and
- arrange for the election of employee representatives if there is no recognised trade union or group of appropriate representatives.

11.2 The changes introduced in 2014 provide an exception for businesses with fewer than ten employees – micro businesses. These businesses are not required to invite the election of representatives for consultation purposes where no existing arrangements are in place.

information

11.3 The employer must inform the trade union or representative 'long enough before a relevant transfer to enable consultation to take place'. The actual time period is not specified and will depend on factors like the size of the organisation, the number of staff involved and the necessary consultation procedures.

11.4 The employer must provide information on:

- the fact that a transfer will take place
- when it is likely to happen
- the reason for it
- the legal, economic or social implications for employees
- whether or not the employer intends to take measures in relation to staff and if so, what measures.

consultation

11.5 The duty to consult arises once the employer envisages taking measures in relation to the employees. The regulations state that consultation must be with 'a view to seeking agreement'. The employer must consider and respond to any representations.

11.6 In practice the timing is often rushed and gaining adequate consultation can be difficult. In addition, the legal duty to consult rests with the employer and there is no legal right to consult the transferee directly before the transfer.

11.7 The 2014 changes allow for consultation on post-transfer redundancies to begin before the transfer and continue after the transfer. However, employers must not select people for redundancy before the transfer takes place.

11.8 Employers are obliged to consult about TUPE before and after the transfer. The changes introduced in 2014 mean that both types of consultation can run concurrently.

information to the new employer

11.9 The transferor must supply information to the transferee about the employees who will be transferring (employee liability information). This information includes:

- the identity and age of the employees
- the employees' employment particulars
- details of any relevant collective agreements
- details of any grievance or disciplinary procedures taken within the last two years
- details of any legal action taken by employees in the last two years
- information on any potential legal action or outstanding claims against the transferor.

11.10 This information must be provided no less than 28 days before the transfer (14 days under the previous regulations). There is no legal obligation to copy this information to the trade union.

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Published by Prospect
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August 2019 – ISBN 0-9543885-6-9
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