

# TUPE transfers: how to navigate the legal risks

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With Amanda Chadwick

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Run Time: Approx 50 Mins

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across **Employment Law, HR and Health & Safety****



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# Today We Will Cover

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- **Introducing TUPE**
- **When does TUPE apply and what does it mean for employees**
- **Pre-transfer obligations**
- **Post transfer changes to terms and dismissals**
- **The future of TUPE**

# TUPE

- Transfer of Undertakings (Protection of Employment) Regulations 2006
- Applies to relevant transfers:
  - Business transfers to another person
  - Service provision changes
- Not share transfers

'Old' employer = 'transferor'  
'New' employer = 'transferee'



## Identifying a relevant transfer – Business Transfers

- Economic entity (whole or part) transfers to another person and retains its identity
- Employer must change
- A multi factor test:
- Assets transfer
- Employees transfer
- Spijkers v Gebroeders Benedik Abattoir CV – the going concern test



## Identifying a relevant transfer – Business Transfers

- Mathieson v United News Shops (EAT)
- Pre-transfer: Newspapers, magazines, confectionary and flowers
- Post-transfer: As before, and clothes, electrical equipment, cards and toys
- Opening hours increased and run on on a commercial basis
- Was it a TUPE transfer?
- No, there were "very significant differences in the goods sold" post-transfer



# Identifying a relevant transfer – Service Provision Changes

- Applies when...
- Outsourcing work done in house
- Bringing outsourced work back in house
- Moving from one outsourced provider to another
- For TUPE to apply:
- Organised grouping of employees
- Client and activities remain the same



# What affect does a TUPE transfer have?

- Employment transfers, including:
- Terms and conditions
- Length of service
- Benefits, etc
- Liabilities
- Ponticelli UK Ltd v. Gallagher



# Pre-transfer obligations



# Elected representatives

## Transferor and Transferee

- Duty on transferor and transferee to inform and consult with staff or representatives
- Representatives to be elected if none in place, unless transferor is a microbusiness
- For transfers on or after 1 July 2024, no requirement to elect representatives where transferor is a:
  - Small business (fewer than 50 employees) undertaking a transfer of any size,
  - Business of any size undertaking a small transfer (of fewer than 10 employees)



# Provision of Employee Liability Information (NELI) Transferor to Transferee

- Transferor must provide “due diligence information”:
- Identity of employees and their contractual terms
- Information about disciplinary and grievances, etc.
- Much of this can be downloaded in a report from your Bright employee management system
- Specialist TUPE Advisory team can support with template NELI documentation
- Risk of £500 per employee if not provided



## Information and consultation Transferee to Transferor

- Transferee must tell transferor of plans to make changes post transfer, or “measures”
- Includes changes to place of work, redundancies etc
- Risk if do not provide measures information
- Consultation to take place with representatives or employees
- Croner Face2Face can come into your business and hold meetings with staff



## Talking to affected employees (and representatives)

- Must inform:
  - That the transfer is happening, when and why
  - Legal, economic and social implications of the transfer for affected employees
  - That there are measures, or that there are not
- Must consult on measures to be taken in connection with the transfer - Todd v Strain
- Failure to do so could lead to a protective award



# The future of TUPE



## Dismissals and varying terms under TUPE

- If the transfer is the sole or principal reason for dismissal, it is automatically unfair
- Changes to terms, if the transfer is the sole or principal reason, are void
- Applies even where the change is favourable to the employees
- Can change for economic, technical or organisational reasons - these do not include harmonisation



## What is an ETO?

- Economic, technical or organisational
- Must entail changes in the workforce, either headcount or material changes to job roles
- Lewis v Dow Silicones UK Ltd
- Transferee tried to rely on ETO defence – changes needed to be made for important safety reasons
- Rejected by EAT as these safety reasons were not raised during consultation pre or post TUPE – only at tribunal



## Case law: Lewis v Dow Silicones UK Ltd (EAT)

- Post-TUPE, employee argued substantial contractual changes were to their detriment, and the TUPE transfer was the sole or principal reason for it
- Employer argued contract terms allowed it
- EAT - "The fact that an employer is contractually entitled to introduce a change in working conditions does not mean it is not a change"
- ET must still ask itself – was the transfer the sole or principal reason for the change?
- If so, transferee must establish an ETO defence or lose the case



# Dealing with transferred employees



## Consultation on further changes

The latest proposed changes under the Employment Rights Bill are aiming to:

- Reaffirm that TUPE only applies to employees
- Stop contract “splitting” of a business between multiple transferees
- Reduce the complexity of the TUPE transfer process
- Reduce the administrative burden and costs of TUPE regulations
- Provide additional clarity for both employers and employees
- Liability under TUPE to be limited to direct obligations between the employee and the employer.
- Address Public Procurement Reforms



# Summary

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- Identifying when a transfer falls within the TUPE regulations involves an analysis of various factors – the 24-Hour Advisory service are here to talk you through this
- To meet your legal obligations, certain information must be shared with the other party to the transfer. Template letters and forms are available from our specialist complex case team to make sure all information is transferred
- Going through a transfer will involve meeting with staff and / their representatives. Let Face2Face help with those meetings you don't want to face alone
- Making changes to terms or dismissing staff where the TUPE transfer is the sole or principal reason is prohibited. Ensure you've established your ETO defence by talking it through with your Croner advisor

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# Thank you!

Any questions

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