

Protection of Rights under TUPE

The TUPE Regulations apply where:

1. A business entity is transferred to another person and it retains its identity.
2. A change in service provider occurs whereby activities continue but are carried out by another contractor on the behalf of a business.

The regulations provide that contracts of employment and employment rights of all employees engaged in the undertaking or business immediately before the transfer are automatically transferred (novated) to the new proprietor. The new proprietor automatically becomes employer of those employees on the same terms and conditions as before, subject to some exceptions the most important of which relates to pension scheme membership.

Employees

The TUPE regulations apply to all employees employed immediately before the transfer by the transferor in the business which is being transferred. An "employee" for this purpose is defined for TUPE regulations purposes as "... any individual who works for another person whether under a contract of service or apprenticeship or otherwise but does not include anyone who provides services under a contract for services"

Relevant Transfers

It can often be difficult to determine if a particular case is a relevant transfer within the meaning of TUPE. All relevant factors must be considered and the weight to be given to each factor will vary in accordance to the facts of each case. In broad general terms it can be said that if no tangible assets are transferred it is likely, especially in an asset intensive industry, that there will not have been a transfer of an undertaking for TUPE

purposes but there is no binding rule to that effect and it is by no means always true. Similarly, if no employees are transferred voluntarily it is likely that there will not have been a transfer of an undertaking (which would have the consequence that all employees are transferred automatically) but again there is no binding rule to that effect and it is by no means always true.



Lyn Harris: Litigation Partner

TUPE Dismissals

The TUPE regulations provide that dismissal of any employee for a reason connected with the transfer will automatically be unfair dismissal. However there is an exception to this rule when the dismissal is subject to a special "economic, technical or organisational reason entailing changes in the workforce". A dismissal by reason of redundancy will, however, frequently count as being for "an economic, technical or organisational reason".

Enforcement of Rights

If you are dismissed you must make any employment related claims against the new owner.

The vendor of a business is absolved of all responsibility to continuing employees. Employee contracts are automatically novated to the transferee by virtue of TUPE

and the new owner is exclusively responsible for all employment related liabilities due to those employees.

Problems can arise if an employee does not continue to be employed. The question as to whether his employment and dismissal rights will be against the original owner or the new owner can be tricky.

In outline the position is that if he was employed in the business immediately before ownership of it was transferred to the new

owner, or if he was dismissed for a reason connected with the business transfer, then he will have rights against the new owner, only. If, on the other hand, he was not employed in the business immediately before its transfer, or was dismissed for a reason which was not connected with the transfer, he will have rights against the former owner only.