

# Employers Beware: TUPE Risks on the Transfer of a Business

by Michelle McDonagh

**TUPE is a commonly used acronym for the legislation that covers a situation when one organisation transfers a business from one Employer to another. This usually happens during an acquisition or merger. Transfer of Undertakings are designed to protect the rights of Employees in the event of such a transfer of ownership and establish the responsibilities of both parties.**

The legislation covering this area is known as European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003. In this article we take an in-depth look at TUPE and answer some questions that Employers might have.

## What is Transfer of Undertakings?

A Transfer of Undertakings is when a business or part of a business transfers from one owner to another. A transfer means the transfer of an economic entity that continues to retain its identity.

TUPE is applicable to Employees, apprentices, agency workers and public servants and is designed so that Employees are not treated unfairly or taken advantage of during the transfer of business.

## Aims of TUPE

The aims of the legislation are to protect the conditions of employment and contracts of employment of Employees involved in the transfer and under some limited circumstances, the protection of employment in a transfer.

The legislation prevents the dismissal of an Employee by reason of transfer of undertakings and ensuring an Employee's rights are passed from one Employer to the other. It also requires that Employees and their representatives are informed of the legal, social and economic implications of the transfer and consult with them as well as protecting continuity of representative rights.

## What issues underpin whether a Transfer of Undertaking applies or not?

In order to determine whether or not there is a transfer of undertaking, or part of, an examination of whether there is a transfer of an "economic entity" that retains its identity should be undertaken.

An economic identity is defined in the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 as "an organised grouping of resources which has the objective of pursuing an economic activity".

Generally speaking, this requires consideration of the type of undertaking or business concerned; whether assets, tangible or intangible, are transferring; whether Employees are taken over; whether customers are transferring; and the degree of similarity between activities carried on before and after the transfer, and the period, if any, for which those activities are suspended.

As part of this assessment, the courts will typically examine whether the entity is a stable economic entity and if so, whether its essential characteristics will be maintained. Essentially, the economic entity must continue the same or similar economic activities post transfer.

## Are all Employees within the scope of TUPE?

The TUPE Regulations define an Employee as a person of any age, who has entered into, or works under a contract of employment which

includes a contract of apprenticeship and a contract whereby an individual agrees with an employment agency to do work for a third party. In the case of agency workers, the Employer is the entity that pays the agency workers' wages.

Apprentices, agency workers, civil servants and anyone working under a contract of employment are all therefore protected by the TUPE Regulations.

## Information and consultation obligations

In a transfer situation, both the original Employer and the new Employer must inform the representatives of their Employees affected by the transfer, of -

- i. the date or proposed date of the transfer;
- ii. the reasons for the transfer;
- iii. the legal implications of the transfer for the Employees and a summary of any relevant economic and social implications of the transfer for them, and any measures envisaged in relation to the Employees.

The original Employer must give this information to the Employees' representatives not later than 30 days before the transfer, in good time before the transfer occurs and in good time before the Employees are directly affected by the transfer as regards their conditions of work and employment.

If either Employer envisage measures in relation to their Employees, the

Employees' representatives must be consulted not later than 30 days before the transfer is carried out or, in good time before the transfer is carried out (taking into account any relevant timing of the Employee measures) with a view to reaching an agreement. Where there are no Employee representatives, the Employers must arrange for the Employees to choose (including by means of an election) representatives for this purpose.

However, if there are still no Employees' representatives in the undertaking through no fault of the Employees, the Employees concerned must be notified in writing, where reasonably practicable, not later than 30 days before the transfer and, in any event, in good time before the transfer, with the particulars described at (i), (ii) and (iii) above.

### Does TUPE apply to outsourcing arrangements?

If arrangements that outsource, insource or change a service provider involve the transfer of an economic entity which retains its identity post transfer, it will be necessary to determine if the TUPE Regulations apply.

Certain functions within an Organisation may be deemed to be an economic entity for the purposes of TUPE. If these functions are outsourced, insourced or the existing service provider is changed, the TUPE Regulations may apply. Business functions like IT, distribution, cleaning, and security may fall within the scope of the TUPE Regulations.

Where a business function like cleaning or maintenance for example is outsourced to a third party, the nature of the work is likely to be the same regardless of whether it is completed by Employees or outsourced to a third party. For the TUPE Regulations to apply however, an outsourcing event must also involve the transfer of significant tangible or intangible assets or the transfer of a major part of the workforce carrying out the outsourced function.

### What Employee rights are protected by TUPE?

The TUPE Regulations effectively require the new Employer to honour the terms and conditions of employment set out in the contracts of employment between the transferor Employer and its Employees. The new Employer must also respect any terms and conditions of the employment contract that were inserted by way of a collective agreement and any entitlements the Employees enjoy by virtue of their accrued service with the transferor. Non-contractual terms, such as policies and procedures, do not automatically transfer, provided that there are no non-contractual terms that can be implied through custom and practice.

The new Employer must not terminate the employment of Employees on the basis of the transfer alone. The new Employer may however make dismissals for economic, technical or organisational reasons, or in other words make redundancies.

If an employment is terminated because a transfer involves a substantial deterioration in the working conditions of the Employee, the Employer concerned is regarded as having been responsible for the termination and is exposed to the risk of an unfair dismissal claim or a claim under the TUPE Regulations.

### Pension rights

Employees' pension rights in relation to old age, invalidity or survivors benefits under supplementary company or inter-company pension schemes do not transfer to the new employment.

However, where there is a pension scheme in operation in the original Employer's business at the time of the transfer, the TUPE Regulations provide that:

- if the scheme is an occupational pension scheme within the meaning of the Pensions Act, 1990, then the protections afforded by the Pensions Act apply to any such scheme,

and

- in respect of the pension schemes which do not come within the remit of the Pensions Act, the new Employer must ensure that rights conferring immediate or prospective entitlement to old age benefits, including survivor's benefits, are protected.

### Conclusion

TUPE is one of the most technical areas of Irish employment law. As a breach of the TUPE Regulations represents a breach of an EU Directive, it can have serious financial consequences as the Workplace Relations Commission has authority to award significant compensation awards as a deterrent.

Organisations that are considering either the sale or purchase of a business that involves a change in Employer must therefore carefully consider their legal obligations under the TUPE Regulations.



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