



# Business transfers and TUPE - Transfer of Undertakings

It may be the case that the business, or part of it, is transferred, usually by sale, to another business. Similarly, it may be that the business takes over an existing business or part of it. In those circumstances, all or some employees may be transferred with the business. If this happens, they be protected under the Transfer of Undertakings (Protection of Employment) Regulations 2006, referred to as TUPE.

## What is a TUPE transfer?

There are generally two types of transfers covered by the TUPE regulations. These are business transfers and service provision changes.

### Business transfers

A business transfer is when a business, or part of a business, is transferred to another business. This could be by way of a merger or a takeover. It does not, generally, include a share sale as that would result in the same company continuing to be the employer.

### Service provision change

A service provision change is generally relevant to outsourced businesses such as cleaning, IT, workplace catering and security. A service provision change occurs when:

- a contractor takes over activities from a client (known as outsourcing).
- a new contractor takes over activities from another contractor (known as re-tendering).
- a client takes activities in-house from other contractors (known as insourcing).

For employees to transfer in these circumstances, they generally need to be assigned to the part of the busi-

ness or contract which is being transferred. Therefore, employees who work most of their time in the part of the business being transferred, will be transferred with it. If an employee works on other things, and only spends a relatively small amount of time on the business being transferred, TUPE will not apply.

For TUPE to apply to any work being outsourced it will also have to be fundamentally the same as the work prior to the transfer.

## What rights does a transferring employee have?

Employees transferring to a new business under TUPE will retain their continuous employment rights and generally their full contractual terms and conditions. They also retain their full statutory rights for such matters as redundancy and dismissal. There are, however, complex rules about pension rights and full occupational pension benefits are not protected.

**Dismissal:** To dismiss an employee who has been transferred from another business, just because they have been transferred, would be automatically unfair. Any dismissal connected to the transfer is unlawful.

To make changes to the workforce as a whole for an economic, technical or organisational reason entailing a change in the workforce, known as ETO reason, can be potentially fair but would need to be fully considered before any action is taken.

**Terms and conditions:** Changes to an employees terms and conditions of employment can only be made if the changes can be justified as an ETO reason or that the changes will improve the employees terms and conditions. An ETO reason may include such things as essential cost saving; the use of new processes and equipment; making changes to the structure of an organisation.

## **Does an employer have to consult with an employee about the transfer?**

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Where employees are going to be transferred, an employer must consult with them via an employee representative. This is usually a trade union official or a representative elected by the employees. If there are less than ten employees an employer may consult directly without the need for representatives.

## **What happens if an employee does not want to be transferred?**

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It is possible for an employee to refuse to work for their new employer, but this will be treated as a resignation, and it will therefore not generally be possible for an employee to claim redundancy or unfair dismissal.

If an employee does not want to be transferred it is not necessary for them to give notice. They are required to tell their existing or new employer that they do not wish to be transferred and their employment will automatically terminate on the transfer date.

## **What if an employee claims they should be transferred?**

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Sometimes an employee claims they should be transferred to a business by way of TUPE and the business does not agree and refuses to accept them.

The cause of this difference of opinion is usually due to the failure to recognise the potential employee being part of the business transferred. This generally affects outsourced businesses where an employee does not spend sufficient time working in the part of the business being transferred. For example, the employee may do several roles for the same organisation but only one of the roles is being transferred and that may be insufficient time spent in that role to make a transfer automatic.

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