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# **TUPE changes – a summary**

# Amending Regulations to TUPE came into force on 31 January. We have prepared a table to help you to understand what has changed, and indicate that the new provisions will simplify TUPE.

# [Click here to view table]

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| **Issue** | **Position under TUPE 2006** | **Changes under TUPE 2014** |
| Can a transferee consult with the transferor’s representatives pre-transfer about proposed redundancies taking affect after the date of transfer? | Although this happened in practice, the law was unclear on whether this consultation would comply with the requirements of collective redundancy legislation. | Pre-transfer consultation can now count towards discharging the transferee’s obligations under collective redundancy legislation.Note however:  1. That the transferor must consent to this; 2. The transferor is not obliged to assist the transferee; and 3. The 30 or 45 day consultation “clock” will only start ticking once consultation actually starts.  The transferee cannot dismiss as redundant any transferring employees until after the date of the transfer. |
| What constitutes a service provision change? | The concept of a service provision change (“SPC”) arises when there is an outsourcing, a re-tendering or a service is brought in-house.  Initially there was thought to be no need for the activities carried out to remain the same after the transfer. However, in the last few years, case law has established that the service provided by the transferee must be “fundamentally” the same as that provided by the transferor. | The requirement for the service to be “fundamentally” the same is now expressly referred to in the new definition of SPC.  This will have little impact in practice as it reflects existing case law. Unfortunately, this does not provide any additional clarity as to what will constitute a SPC and in the event of a dispute, the Tribunal will determine the issue. In effect, both forms of potential TUPE transfer – a standard business transfer or a SPC are, once again, likely to be subject to the same sort of analysis under the well known “Spijkers" case. |
| What are the circumstances in which an employee can be fairly dismissed? | If an employee is dismissed and the principal reason is the transfer itself, the dismissal will be automatically unfair. If an employee is dismissed for a reason connected to the transfer which is not an economic, technical or organisational (“ETO”) reason, the dismissal will also be automatically unfair.If an employee is dismissed for an ETO reason, the dismissal will be fair providing it meets the ordinary requirements of fairness.. | The new position is that dismissals will be automatically unfair if the sole or principal reason for a dismissal of an employee is the transfer.  However, where the sole or principal reason for the dismissal is an ETO reason, the dismissal will be potentially fair providing it meets the ordinary requirements of fairness.  Whilst the new rules do not refer to dismissals ‘connected to’ the transfer, this is unlikely to make much practical difference.  The Acquired Rights Directive does not use the words ‘reason connected to the transfer’, but the Court of Justice of the European Union (“CJEU”) has referenced it when determining cases.  The Government has acknowledged that there will be uncertainty about when dismissals will be fair under the new rules. The new rules provide that a change of location can constitute an ETO reason.  This looks to be welcome news as it reduces the potential liabilities for automatic unfair dismissal arising from post-transfer relocations. Unfortunately, there is still some uncertainty as the Acquired Rights Directive does not expressly include a change of location in its definition of an ETO. This could therefore be open to challenge. |
| Can a transferee change the terms and conditions of a transferring employee? | Harmonisation is prohibited.Changes to an employee’s terms and conditions of employment are void if the principal reason is the transfer, or for a reason connected with the transfer that is not an ETO reason.Employers can only change terms and conditions to the extent that:It can establish an ETO reason and the employee agrees to the change.The changes are unconnected with the transfer.It is subject to relevant insolvency proceedings and changes are needed to save the business | It is still not possible to harmonise terms and conditions.The new regulations provide that changes can be made:Where the contract of employment expressly permits the variation.Where the variation amounts to an ETO reason and the employee consents to the change. A change of location is expressed to be an ETO reason. These express provisions appear to give a transferee more flexibility, but there are potential problems for employers seeking to rely on them.  The contractual right to vary T&C’s is construed narrowly. It is likely to only cover changes that are expressly referred to (such as the right to require an employee to work at a different location) rather than general provisions giving the employer the right to make any contractual changes. Any changes that are made must not damage the implied duty of trust and confidence between the parties.  Even changes that are permitted under the contract could amount to a ‘substantial change’ to the ‘material detriment’ of the employee under TUPE 2006. Such changes can lead to a successful claim for automatic unfair dismissal.  Employees could also challenge any attempt to change their terms on the wider basis that this is contrary to the principles of the Acquired Rights Directive. |
| To what extent can an employer change collectively agreed terms and conditions? | Recent case-law has established that a transferee who is not a party to a collective agreement is not bound by future changes if they are not represented in those negotiations.  The collective agreement becomes fixed at the point of transfer. NB - changes taking effect after the transfer that had been negotiated on the transferor’s behalf will continue to bind the transferee. Collectively agreed terms can only be changed to the extent that the reason for the change is not the transfer, or a reason connected with it that is not an ETO reason. | The new provisions codify the case-law with regard to fixing collectively agreed terms at the point of transfer.  However, the new provisions go further and provide that changes to collectively agreed terms can be made one year after the transfer, provided overall the terms are ‘no less favourable’. There is no definition of what is meant by this concept.  The position may be less clear than the new provisions suggest. Employers will not be able to rely on this provision to harmonise terms and conditions of employment (as this is not permitted under the Directive).  Transferees who wish to make changes a year or more after the transfer are better advised to find a business reason to rely on rather than bringing the transfer itself into the argument. |
| When do transferors have to provide employee liability information to transferees? | This information is required no less than 14 days before the transfer. | The new provisions require this information to be provided no less than 28 days before the transfer.This provision only affects transfers from 1 May 2014. |
| Are there any exceptions to the provisions of TUPE that apply to micro businesses? | All businesses, whatever their size, are required to comply with the provisions of TUPE. | Businesses with fewer than 10 staff will be allowed to inform and consult directly with employees where there are no pre-existing employee representatives who are recognised.  This is a significant improvement and will mean that transfers can be affected more quickly and cost effectively without the need to undertake an employee representative election process. |