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TRANSFER OF UNDERTAKINGS UNITED KINGDOM

The Acquired Rights Directive (and its successor, the Transfer of Undertakings Directive) required all EU member states to implement laws protecting employees who are affected by a transfer of a business. These protections apply when a business is transferred (although generally do not apply to pure share sales). Although the member states have implemented the Directives with some minor variations (and some offer enhanced protections beyond the minimum requirements of the Directives), all require the transferor (typically the seller of the transferring business) and the transferee (the buyer) to share information and consult with affected employees, and provide protections for the affected employees against being dismissed or having their terms of employment altered as a result of the transfer. In some member states, these requirements are relaxed in insolvency scenarios.

1. WHAT IS THE DEFINITION OF A RELEVANT TRANSFER / WHEN DOES TUPE APPLY?

1.1 The Transfer of Undertakings (Protection of Employment) Regulations 2006 (as amended) apply in the following scenarios:

1.1.1 A business transfer:

A transfer of a business or undertaking (or part of a business or undertaking) where there is a transfer of an economic entity that retains its identity – typically a transfer of the business and its assets.

1.1.2 A service provision change ("SPC"):

This applies (with limited exceptions) to outsourcings, insourcings and changes of service provider where there was an organised grouping of employees carrying out the relevant activity pre-transfer and the transferor intends that the transferee will take over the activity on a continuous rather than one-off basis. Most

1.2 TUPE applies in cross border issues where the "economic entity" is situated in the UK immediately before the transfer and, in the case of a service provision change, where there is an organised grouping of employees situated in Great Britain immediately before the change.

1.3 TUPE generally doesn't apply to transfers of shares, as the identity of the employer must change for there to be a relevant transfer. However, it *would* apply to an asset transfer carried out as a precursor to or following a share sale.

2. WHAT ARE THE MANDATORY INFORMATION AND CONSULTATION REQUIREMENTS?

2.1 The transferor must provide prescribed information about the employees to be transferred (the 'employee liability information') to the transferee. This includes all the information

which under UK law has to be included in the employees' contracts of employment. This information must be provided in writing no less than 28 days before the transfer. If the transferor fails to provide this information, the transferee may pursue a claim in the Employment Tribunal.

- 2.2 Both the transferor and the transferee must inform and (if appropriate) consult with elected employee representatives or trade union representatives of the employees affected by the transfer. As well as the transferring employees, this includes their colleagues under the old or the new employer whose jobs might be affected. Again, there is prescribed information that the transferee or transferor must provide in writing.
- 2.3 The duty to consult only arises where an employer envisages taking measures in respect of affected employees, e.g. making redundancies. (Where there are fewer than 10 employees, the transferor or transferee can inform and consult with them directly rather than arranging for employee representatives to be elected.)
- 2.4 The transferee can consult about proposed redundancies with the transferring employees' representatives (if it gives written notice and the transferor agrees). This is helpful where 20 or more redundancies are to be made, as the mandatory consultation period (30 or 45 days, depending on numbers) may be completed pre-transfer.
- 2.5 If either the transferor or transferee fails to comply with the information and consultation duties, the employees are entitled to claim compensation of up to 13 weeks' pay. The transferor and transferee may, in certain circumstances, be held to be jointly and severally liable for this.

3. **CAN EMPLOYEES OBJECT TO THE TRANSFER AND, IF SO, WHAT ARE THE CONSEQUENCES?**

- 3.1 Although they cannot prevent the transfer going ahead, individual employees can object to their employment being transferred. If they do so, their employment will end on the date of the transfer.
- 3.2 If the new employer seeks to impose new terms or working arrangements which are materially detrimental to the employees, they may be entitled to treat themselves as constructively dismissed. Resignations in response to a repudiatory breach of contract or to substantial changes in working conditions to the employee's material detriment are treated as deemed dismissals to which the enhanced protection against dismissal applies (regulation 4(9) and 4(11) TUPE).

4. **CAN THE EMPLOYER CHANGE TERMS AND CONDITIONS OF EMPLOYMENT FOLLOWING THE TRANSFER?**

- 4.1 The transferee takes on the transferring employees on their existing terms of employment, and can only make changes to their terms in limited circumstances. Changes to terms of employment will be void if the sole or principal reason for the change is the transfer itself, unless either:
 - the reason for the variation is a valid Economic, Technical or Organisational reason (an 'ETO Reason'); or
 - the reason for the variation is the transfer, but the terms of the employee's pre-existing contract permit the employer to vary the employee's terms and conditions.

4.2 An employee who has entered into a varied contract with the transferee will effectively be able to choose whichever pre-transfer or post-transfer terms are more beneficial to them.

5. **WHAT PROTECTIONS DO AFFECTED EMPLOYEES HAVE AGAINST DISMISSAL?**

5.1 TUPE provides employees with enhanced protection against dismissal. In order to qualify for this protection, the employees must have 2 years' continuous service.

5.2 For those employees that qualify, their dismissal will be deemed **automatically unfair** if the sole or principal reason for the dismissal is the transfer itself.

5.3 However, if the employer can show that the reason for dismissal is an ETO reason entailing changes in the workforce (numbers, functions or location), then the dismissal will instead be **potentially unfair**.

5.4 To defend a claim for unfair dismissal where there is a valid ETO reason the employer must also show that the dismissal was procedurally and substantively fair.

6. **WHAT IS THE EFFECT OF THE TRANSFER ON THE COLLECTIVE STATUS OF EMPLOYEES (COLLECTIVE AGREEMENTS AND COMMON PRACTICES)?**

6.1 Terms and conditions in new collective agreements, or changes to existing ones, may be automatically incorporated into individual contracts of employment. However, if the collective agreement has not been agreed at the time of the transfer then the transferee must be a party to the collective bargaining or a party to the subsequent agreement. If they aren't, the new rights will not transfer.

6.2 After one year post-transfer, the new employer may vary individual terms that stem from a collective agreement. However, such variations must be no less favourable, when considered together, than the previous terms. Changes which do not satisfy these conditions are void.

7. **WHAT IS THE IMPACT OF THE TRANSFER ON STAFF REPRESENTATIVES?**

7.1 TUPE provides a list of specific requirements, requiring employers to ensure that fair elections of staff representatives can take place.

7.2 The staff representatives are granted rights and protections so that they can effectively carry out their function. For instance, if they are dismissed and the dismissal is chiefly related to their role as representative, then that dismissal will be deemed to be **automatically unfair**.

7.3 The representatives must have access to such facilities as is appropriate for them to carry out their function. They also have a right to reasonable time off with pay during working hours so that they can dedicate time to their duties as representative.

This material is for general information only and is not intended to provide legal advice

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