

What is TUPE, Why is it relevant?

What is TUPE and why is it Relevant for an HR professional or an Employment Lawyer?

A “TUPE”, or a transfer of undertakings under the EC (Protection of Employees on Transfer of Undertakings) Regulations 2003 (the “Regulations”), occurs where there is a transfer of a business, or part of a business, which retains its identity after the transfer.

In very basic terms, the Regulations provide that employees attaching to a business which is being transferred are entitled to “follow the work” and transfer with the business to the new employer on the same terms and conditions of employment (save for an important exception relating to pensions). The employees also enjoy certain protections from transfer related dismissals.

When determining whether TUPE applies to the sale of a business, the following factors must be considered on a case by case basis:

- whether tangible assets are transferred;
- the value of the business’s intangible assets;
- whether the majority of employees are taken over by the transferee;
- whether or not customers are transferred;
- whether pre-and post-transfer activities are similar; and
- the period of suspension of any activities.

However, additional factors must be considered when determining whether TUPE applies to the transfer of a contract (i.e. the right to provide a service or function).

Why should you know about TUPE?

TUPE applies every day to an enormous number of different business transactions and it is essential that employers of all sizes understand what employment liabilities can arise. TUPE can apply (to name but a few of many examples) when employers:

- sell or buy part or all of a business as a going concern;
- outsource or make a "service provision change" involving either (a) an initial outsourcing of a service (e.g. where services transfer from the customer to an external contractor); (b) a subsequent transfer (e.g. where services transfer from the first external contractor to a different external contractor; and (c) bringing the service back in-house (e.g. where services transfer from an external contractor back to the customer)
- grant or take over a lease or licence of premises and operate the same business from those premises.

What should you know anything about TUPE?

To protect your Company or firm from claims, you need to understand:

- when TUPE is likely to apply;
- what TUPE means legally;
- what you have to do to comply with TUPE and the penalties for failing to do so; and
- what other steps you can take to protect your business from the effects of TUPE.

But I am an HR professional or Employment Lawyer Based outside the UK, do I need to know anything about TUPE?

TUPE can apply to businesses that are based outside the UK as well.

In *Holis Metal Industries Limited v GMB & Newell Limited (2007)*, the Employment Appeal Tribunal (EAT) has held that the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) can apply to cross-border transfers of businesses outside of the United Kingdom where the business does not remain in the jurisdiction upon the transfer. This case is particularly relevant for businesses involved in outsourcing services to another jurisdiction ('off-shoring'). Although enforcing TUPE outside the UK may present practical difficulties, the EAT's decision provides welcome clarity about the extra-territorial application of TUPE.

TUPE implements European legislation into the UK to provide for the protection of the rights of employees on the transfer of an undertaking or a service provision transfer. TUPE introduced important concepts into UK employment law, principally: protection against dismissal connected with a TUPE transfer; automatic transfer to the transferee of all rights, liabilities and obligations in relation to the transferring employees; the obligation to inform and consult with regard to the proposed transfer; and the requirement on the transferor to provide the transferee with certain information about the transferring employees.

In this case, part of a curtain-making business was transferred from a factory in Tamworth (owned by Newell Ltd) to Holis Metal Industries Ltd, a company based in Israel. None of the affected employees wished to transfer to work in Israel and so they were made redundant. The employees' representing union, GMB, brought a claim in the Employment Tribunal against Holis for breaches of its obligations under TUPE to inform and consult employees and collective redundancy consultation laws. In order for this claim to succeed, the GMB needed to show that TUPE can apply to a transfer of a business outside of the UK (and, indeed, the European Union). Holis argued that it was not bound by obligations under TUPE as it could only apply to transfers between businesses within the EU. As the transfer was from the UK to Israel, Holis maintained that TUPE did not apply. There has not previously been a decision by the UK courts on this, although many commentators and practitioners have operated on the assumption that there was certainly a strong possibility that TUPE had extra-territorial application. The EAT acknowledged that TUPE applies to a business transfer in cases where the undertaking is situated in the UK immediately before the transfer, and a service provision change in cases where there is an organised grouping of employees situated

in Great Britain immediately before the service provision change. It referred to Regulation 3(4)(b) of TUPE, which states that TUPE applies even if:

- The transfer of the business is governed or effected by the law of a country or territory outside the UK or the service provision change is governed or effected by the law of a country or territory outside Great Britain; or
- The relevant employees' employment is governed by any such law.

Rejecting Holis' arguments, the EAT agreed with the Tribunal that, in theory, TUPE can apply to cross-border transfers, even outside of the EU, despite the inherent difficulties in enforcing any consequential tribunal awards. Whilst acknowledging the common law presumption that legislation does not normally have extra-territorial effect, the EAT held that the UK courts had jurisdiction because employees can only avail themselves of rights under TUPE if the business was originally based within the UK. The purpose of TUPE is to protect employees upon the change of employer and this applies to cross-border transactions. This international element to TUPE was reflected in the service provision changes in 2006 which, the EAT stated, was "clearly aimed at the modern outsourcing of service provision, particularly call centres, whether inside or outside the EU." The EAT referred the case back to the Tribunal to examine closely the evidence to determine whether TUPE applied to transfer the employees to the transferee company. This decision avoids the unscrupulous practice whereby a company can set up an overseas subsidiary in order to avoid the impact of TUPE. The EAT did note that it may be that, upon transfer of a business to a different country, the transferred business does not retain its identity as an economic entity, negating TUPE's application in such cases. However, this point does not apply in relation to service provision changes and will be judged on a case-by-case basis where it does apply.

This case raises legal and practical considerations for entities involved in international business transfers or off-shoring practices that fall within TUPE's scope, particularly those relating to call centres and IT support where UK-based services are often transferred to service providers abroad, either inside or outside the EU. Businesses should take necessary measures to satisfy obligations under TUPE to avoid potential claims in circumstances where a service or business is transferring out of the UK to a country inside the EU or otherwise. Practically, most relevant are obligations to inform and consult.

Providing the business was located in the UK immediately prior to the transfer, TUPE will transfer the employee's employment to the foreign transferee but the employee will remain employed in the UK under their existing terms of employment. The foreign employer may offer the employee work in the foreign jurisdiction as an alternative offer of employment, usually on local terms and conditions. If the employees refuse this offer and the foreign employer does not want to employ staff in the UK, in most cases it will offer 'place of work' redundancy.