

Information and Consultation in Transfer

Information and consultation in transfers

Who must inform and consult

The duty to inform and consult applies to any employer with employees who may be 'affected' by the transfer or 'measures' connected with it. This will always include the transferor but, in addition:

References: TUPE 2006, SI 2006/246, reg 13

- o the transferor may have to inform and consult with any non-transferring workforce if it may be affected by the transfer and
- o the transferee may also have obligations to its own workforce if it could be affected by the transfer

Who must be informed and consulted

The employer must inform and consult with:

- o any trade union representatives recognised for any category of affected employee
- o elected employee representatives for any other category of affected employee

Employee representatives need not be specially elected for this purpose if there is an existing body constituted to conduct this type of role on this type of issue. The BIS Guidance on the TUPE Regulations 2006 states: 'It would not, for example, be appropriate to inform and consult a committee specially established to consider the operation of a staff canteen about a transfer affecting, say, sales staff; but it may well be appropriate to inform and consult a fairly elected or appointed committee of employees, such as a works council, that is regularly informed or consulted more generally about the business's financial position and personnel matters'.

References: BIS Guidance on TUPE 2006

A representative body set up under the Information and Consultation of Employees Regulations 2004 *could* be a relevant elected employee body for this purpose (only for employees without a recognised trade union).

If there are no relevant trade union or employee representatives then the employer must invite the affected employees to elect representatives. If the employees fail to elect representatives within a reasonable time of having been invited to do so, the only obligation on the employer is to inform each employee individually of the matters set out in reg 13(2) (and any consultation requirement falls away).

References: TUPE 2006, SI 2006/246, reg 13(2), 13(11)

Howard v Millrise [2005] IRLR 84

Hickling t/a Imperial Day Nursery v Marshall UKEAT/0217/10/CEA

Affected employees

Both the duty to inform and the duty to consult only apply to an employer of an 'affected employee'.

References: TUPE 2006, SI 2006/246, reg 13(2), 13(6)

TUPE 2006 defines 'affected employees' as any employees of the transferor or the transferee (whether or not assigned to the organised grouping of resources or employees that is the subject of a relevant transfer) who may be affected by:

References: TUPE 2006, SI 2006/246, reg 13(1)

- o the transfer, or
- o measures taken in connection with it

An employee will only be 'affected' by the transfer or measures taken in connection with it if:

References: Unison v (1) Somerset CC (2) Taunton Deane BC (3) South West One [2010] IRLR 207

- o he is part of the group which will be or may be transferred, or
- o his job is in jeopardy by reason of the proposed transfer, or
- o he has a job application (to a post which will or may be transferred, or which is in jeopardy by reason of the proposed transfer) pending at the time of transfer

The definition does not extend:

- o to the whole of the workforce, or
- o to everyone in the workforce who might apply for a vacancy in the part transferred at some point in the future

Measures

There is no definition of 'measures'. It is a deliberately wide and vague term which can encompass any action, step or arrangement, ranging from changes to working arrangements and job cuts to loss of non-contractual benefits like membership of a social club or canteen facilities.

References: TUPE 2006, SI 2006/246, reg 13(1)-(2), 13(6)

IPCS v SoS for Defence [1987] IRLR 373

A measure can include administrative changes such as a change in the payment of wages prior to the transfer.

References: Todd v (1) Strain (2) Care Concern GB (3) Dillon [2011] IRLR 11

The duty to consult arises irrespective of whether or not the measures to be taken are advantageous to the employees, provided the effect of them is not so trivial as to be de minimis.

References: Todd v (1) Strain (2) Care Concern GB (3) Dillon [2011] IRLR 11

However, the act of transferring employees to the transferee is almost certainly not itself a 'measure'.

Arranging elections

Regulation 14 of TUPE sets out requirements for the election of representatives (these mirror the requirements for consultation on collective redundancies). It does not specify how many representatives must be elected or the process by which they are to be chosen. The employer must:

References: TUPE 2006, SI 2006/246, reg 14

- o ensure the election is fair (making any reasonably practical arrangements to do so)
- o decide how many representatives are needed to represent the employee's interests (in terms of number and classes of employees)
- o decide whether each representative should represent a particular class of employees or all affected employees
- o decide the representatives' term of office (sufficient to last the entire information and consultation process)
- o ensure all candidates for employee representatives are affected employees at the election date
- o ensure no affected employee is unreasonably excluded from standing for election
- o ensure all affected employees (and only those employees) at the election date are entitled to vote
- o ensure employees can vote for as many candidates as there will be representatives looking after their interests (so, if each class of employees gets one representative, they can vote for one candidate and, if each employee is represented by all representatives in a five-person body, they can vote for five candidates)
- o ensure as far as reasonably practicable that voting is in secret and that votes are accurately counted
- o ensure another election is held under the same rules to replace any elected representative who ceases to act

The consultation process will be open to challenge unless there is a proper balance between the interests of different groups or classes of employees, some of whom may be more affected by the transfer than others. Careful thought should therefore be given to the number of candidates and the voting constituencies. Similarly, employees must be given a reasonable time to nominate and consider candidates and be able to vote even if they are absent from work (for whatever reason) on election day. There may also be an established practice for electing representatives which should be followed unless there are good reasons not to. References: BIS guidance: Employment Rights on the Transfer of an Undertaking (June 2009) (p 24)

Rights of employee representatives

Representatives and candidates for election must be allowed to carry out their function. They have essentially the same rights and protections as trade union representatives, involving:

- o access to their electorate
- o appropriate use of facilities, eg telephone, meeting room
- o time off with pay during normal working hours to carry out representative duties
- o protection against dismissal (or detriment short of dismissal) on grounds related to their representative status or activities: dismissal will be automatically unfair and could result in a reinstatement/re-engagement order

The duty to inform and consult

Information

The employer(s) of any affected employees (ie the transferor and/or the transferee) must provide certain information to those employees' representatives:

References: TUPE 2006, SI 2006/246, reg 13(2)

- o the fact and proposed date of the transfer
- o the reasons for the transfer
- o the legal, economic and social implications of the transfer for the affected employees
- o any measures which the relevant employer envisages taking in relation to employees or, if there are none, that fact
- o as regards agency workers:
References: TUPE 2006, SI 2006/246, reg 13(2A)
 - o the number of agency workers working temporarily for and under the supervision and direction of the employer
 - o the parts of the employer's undertaking in which those agency workers are working
 - o the type of work those agency workers are carrying out

In the case of the transferor employer, it must also inform the representatives of its affected employees of any measures, in connection with the transfer, which it envisages *the transferee* will take in relation to any such employees who will transfer to the transferee. If the transferor envisages that no such measures will be taken by the transferee, it must inform the representatives of that fact. The transferee is under a corresponding duty to furnish the transferor with such information at such a time as will enable the transferor to comply with these requirements.

References: TUPE 2006, SI 2006/246, reg 13(2)(d), 13(4)

Employers have a common law duty to take reasonable care in giving information to employees.

References: Hagen v ICI [2002] IRLR 31

Employers will comply with the duty to inform representatives of the legal, economic and social implications of a transfer if they state what they genuinely believe those implications to be, even if they are wrong.

References: Royal Mail Group v Communication Workers Union [2009] IRLR 1046

The requirement to provide information is designed to allow the representatives of employees affected by the transfer to engage in a consultation process with the employer on an informed basis, which is part of the industrial relations rationale behind TUPE and the Acquired Rights Directive.

References: *Cable Realisations v GMB Northern* [2010] IRLR 42

The requirement to provide information can arise (under regulation 13(2)) even if there is no *obligation* to consult (under regulation 13(6))

References: TUPE 2006, SI 2006/246, regs 13(2), 13(6)

IPCS v SoS for Defence [1987] IRLR 373

Cable Realisations v GMB Northern [2010] IRLR 42

Consultation

Consultation is only required if the transferor/transferee 'envisages' taking 'measures' in relation to its employees. 'Measures' is a deliberately vague term

References: TUPE, SI 2006/246, reg 13(6)

'Envisages' is vaguer than 'intends' and means visualises or foresees. The duty to consult arises where the employer has formulated a definite plan or proposal which it has in mind to implement, if necessary after appropriate negotiation with the unions.

References: Acquired Rights Directive 2001/23/EC

IPCS v SoS for Defence [1987] IRLR 373

However, since the act of transferring employees to the transferee is almost certainly not itself a 'measure', it follows that unless the transferor is carrying out a pre-transfer reorganisation or redundancy programme, it may very well not have to consult at all. It is obliged to inform but not consult about measures envisaged by the transferee.

Consultation must take place with a view to reaching agreement. The ECJ ruled that this amounts to an obligation to negotiate and does not mean that the employer has to actually reach agreement.

References: *Junk v K, hnel* [2005] IRLR 310

The employer has to consider any representations made by the employee representatives, reply to those representations and, if it rejects any of them, explain why.

The consultation must be fair, which means:

References: *R v Gwent County Council, ex p Bryant*

R v British Coal Corporation, ex p Price [1994] IRLR 72

- o consultation when the proposals are still at a formative stage
- o adequate information on which to respond
- o adequate time in which to respond
- o conscientious consideration by an authority of the response to consultation

Under the old TUPE, the transferee was only obliged to consult its own employees. In practice, transferees often attended meetings with the transferor's staff and even consulted informally on its proposed measures, to establish good relations.

The wording of the new TUPE 2006 is different, although the DTI (now BIS) has said there was no intention to change. It states that 'an employer of an affected employee who envisages that he will take measures in relation to an affected employee... shall consult the appropriate representatives of that employee...' The two references to an affected employee need not be to the same person.

References: TUPE, SI 2006/246, reg 13(6)

TUPE 2006 also states that 'references to affected employees... are to any employees of the transferor or the transferee ... and references to the employer shall be construed accordingly'.

References: TUPE 2006, SI 2006/246, reg 13(1)

This potentially creates an obligation for either transferor and transferee to consult with the other's employees in relation to measures affecting them. In practice, this is more likely to involve the transferee consulting with transferring employees. If, contrary to the view, the act of transferring employees is itself a measure, it could also require the transferor to consult with the transferee's employees.

Confidentiality and other excuses

Requirements of confidentiality (eg under Listing Rules/contract) will not usually excuse failure to inform and consult: the solution is to impose obligations of confidence on representatives. The duty to inform and consult applies whoever is controlling the transaction so a failure to provide information by the person (directly or indirectly) controlling the employer, such as the parent company, would not make the employer any less liable.

Incomplete compliance can only be excused where it is not reasonably practicable to comply due to special circumstances and the employer takes all steps towards full compliance as are reasonably practicable in the circumstances.

References: TUPE 2006, SI 2006/246, reg 15(2)

The defence is construed narrowly: the occurrence must be sudden, unforeseen and out of the ordinary, such as the destruction of a plant or the sudden withdrawal of supplies from a company's main supplier; financial difficulties and the risk of damage to employee morale will not be enough. This is analogous to the special circumstances defence to collective redundancy consultation obligations.

References: *Bakers' Union v Clarks* [1978] IRLR 366

Timescale

TUPE provides that the process should be started long enough before the transfer to enable it to be completed.

References: TUPE 2006, SI 2006/246, reg 13(2)

There is no requirement to start the process immediately a transfer is proposed and there is no set timetable: what is 'early enough' depends on the individual circumstances, such as whether employee representatives are already in place or elections need to be arranged, whether there are any measures to consult about and, if there are, how controversial and problematic they are likely to be when conducted with a view to reaching agreement.

This means the period could be a few days for a small-scale transfer involving few employees with representatives already in place and no measures envisaged. Sometimes, the whole process can be done between exchange and completion of the transaction provided no measures arise from the documentation agreed at exchange which would support a claim that consultation was not genuine in those circumstances. If there is a TICER/ICER agreement, information and consultation will probably need to begin much earlier.

References: TICER, SI 1999/3323

ICER, SI 2004/3426

The timescale will lengthen into months if there is a need for elections, a large number of affected employees, substantial job losses and changes to working arrangements. It is better for an employer to start the process late than not at all, as carrying out some of the obligations may decrease the amount of compensation awarded by a tribunal and may also reduce the risk of claims being brought for compensation.

Failure to inform and consult

Claims for failure to inform and consult can be made:

References: TUPE 2006, SI 2006/246, reg 15(1)

- o by the trade union, where there are trade union representatives
- o by the elected employee representatives, where there are any

- o by any affected employee, in any other situation including where the failure relates to the election of employee representatives

The penalty for failure to inform or consult may be awarded against either the transferor or the transferee as appropriate.

References: TUPE 2006, SI 2006/246, reg 15(7)-(8)

The sum awarded shall be such amount as the tribunal thinks is just and equitable up to 13 weeks' pay per affected employee.

References: TUPE 2006, SI 2006/246, reg 16(3)

A week's pay is actual pay, *not* capped at the statutory limit (currently £450 per week).

References: TUPE 2006, SI 2006/246, reg 16(4)

ERA 1996, ss 220-228

Zaman and Zahur v Kozee Sleep Products t/a Dorlux Beds UK [2011] IRLR 196

For the purposes of calculating a week's pay (in accordance with sections 220-228 of the ERA 1996), the calculation date will be:

References: TUPE 2006, SI 2006/246, reg 16(4)

ERA 1996, ss 220-228

- o if the employee is dismissed by reason of redundancy, the calculation date for the purposes of his entitlement to a redundancy payment (if any), or the date which would be the calculation date if he were entitled to a redundancy payment
- o if the employee is dismissed for any other reason, the effective date of termination of his contract of employment
- o in any other case, the date of the relevant transfer

The award is intended to be punitive rather than compensatory -- the maximum should be awarded unless there are mitigating circumstances, in order to punish the employer's default. Tribunals can take into account any actual loss suffered by an employee as a result of the failure to consult but proof of loss is neither necessary nor determinative of the level of award.

References: Sweetin v Coral [2006] IRLR 252

Awards will initially be made in respect of one or more descriptions of affected employees (as opposed to in favour of specific individuals).

References: TUPE 2006, SI 2006/246, reg 15(7)-(8)

Where such an award in favour of one or more descriptions of affected employees is made against the transferor, the transferee shall be jointly and severally liable in respect of the compensation payable.

References: TUPE 2006, SI 2006/246, reg 15(9)

Once such an award has been ordered (against either a transferor or transferee), any employee who falls into the description of affected employees may subsequently bring a claim for the sum due to him if the transferor or transferee against whom the initial award was made has failed to pay it.

References: TUPE 2006, SI 2006/246, reg 15(10)

Where such a claim is made by an individual affected employee and succeeds, the tribunal will order the transferor or transferee as applicable to pay him the amount of compensation he is due. Irrespective of whether the tribunal makes the order against the transferor or the transferee, both the transferor **and** the transferee will be jointly and severally liable to pay the amount ordered.

References: TUPE 2006, SI 2006/246, regs 15(9)-(11)

It follows that although, where the tribunal makes an initial award against a transferee in favour of one or more descriptions of affected employees, the transferor is not initially jointly and severally liable for that award, the transferor will **become** jointly and severally liable to any individual affected employee where:

- o the transferee fails to pay him what he is due, and
- o the employee brings an individual claim to seek an award

Where the transferor claims that the reason for its failure is because the transferee did not provide it with information about the measures it proposed to take in relation to the transferring employees, the transferor should give notice of this to the transferee, thereby joining it to the proceedings. If the transferor proves its claim, the award will be made against the transferee.

References: TUPE 2006, SI 2006/246, reg 15(5)

The current judicial view is that the tribunal has exclusive jurisdiction to deal with failure to inform and consult and therefore the courts will not intervene to grant an injunction to prevent a TUPE transfer taking place until a proper information and consultation process has been followed. This also accords with the DTI's (now BIS's) view as expressed in 'TUPE: draft revised regulations -- Government response to the public consultation' (February 2006).

The risk of claims for failure to inform and consult will vary considerably depending on the circumstances. Where the risk is low, some clients may take a more relaxed attitude (eg deciding, where no measures are envisaged and the only obligation is to inform, not to set up elections but instead to give the required information to each individual employee).

It is not possible to contract out of these requirements. Claims cannot even be settled by compromise agreements.

References: TUPE 2006, SI 2006/246, reg 18

However, they can be settled by ACAS conciliation.

References: TUPE 2006, SI 2006/246, reg 16(1)

Read more about this from Butterworths

Harvey F[227]-[234] -- Failure to inform or consult

Employee liability information

In addition to any due diligence agreed between the parties, TUPE requires the transferor to provide specified employee liability information to the transferee at least two weeks prior to completion. However, if special circumstances make this not reasonably practicable, the information must be supplied as soon as is reasonably practicable. The BIS Guidance states (at page 21) 'clearly, it would not be reasonably practicable to provide the information in time, if the transferor did not know the identity of the transferee until very late in the process, as might occur when service contracts are re-assigned from one contractor to another by a client, or, more generally, when the transfer takes place at very short notice'.

References: TUPE 2006, SI 2006/246, reg 11

BIS Guidance on TUPE 2006

The information must be correct as at a specified date not more than 14 days before the date on which it is provided. If it changes after being provided but before completion of the transfer, the transferor must notify the transferee of those changes in writing.

The information must be given for every transferring employee (including employees who would have transferred if they had not been automatically unfairly dismissed in connection with the transfer):

- o their identity and age
- o their s 1 ERA 1996 particulars of employment
- o any collective agreement which will apply to them after the transfer

- o any disciplinary procedure taken against, and any grievance procedure taken by, any transferring employee during the last two years, to which:
 - either the Acas Code of Practice on disciplinary and grievance procedures applied
 - or, in relation to older episodes, the (now repealed) statutory dispute resolution procedures applied
- o any court or tribunal claim against the transferor they have brought in the last two years or the transferor has reasonable grounds to believe they may bring. It is a matter of judgement whether there are reasonable grounds to anticipate a claim

The BIS Guidance suggests that 'where an incident seems trifling - say, where an employee slipped at work but did not take any time off as a result - then there is little reason to suppose that a claim for personal injury damages would result. In contrast, if a fall at work led to hospitalisation over a long period or where a union representative raised the incident as a health and safety concern, then the transferor should inform the transferee accordingly'.

Method of disclosure

The information must be provided in writing or in other forms which are 'readily accessible' to the transferee. The BIS Guidance states (page 20) that: 'it may be possible for the transferor to send the information as computer data files as long as the transferee can access that information, or provide access to the transferor's data storage. Likewise, in cases where a very small number of employees are transferring and small amounts of information may be involved, it might be acceptable to provide the information by telephone.' It also suggests that the transferor can supply some information in the form of staff handbooks, sample contracts or the texts of collective agreements but that, in any event it would be good practice for the transferor to consult the transferee first to discuss the methods to be used.

References: BIS Guidance on TUPE 2006

The information may be given in several instalments. It can also be provided via a third party (eg whoever is in charge of the tender process) but liability remains with the transferor.

There is no requirement for the transferee to return the information if the transaction does not proceed. There is no statutory confidentiality obligation either (this would need to be dealt with contractually).

The statutory requirement to provide this information means that employee consent is not required under the Data Protection Act: both sensitive and other personal data can be processed to comply with a statutory legal obligation. Any agreement to provide additional information may mean the information has to be anonymised or express consent obtained.

Further, the new obligation is unlikely to change the Information Commissioner's view that employees should be informed of the transfer of non-anonymised data in advance, although this view may be going too far in any event. Also note that the statutory obligation condition would presumably only be satisfied in relation to providing information through a third party if that were 'necessary' eg where the identity of the transferee was not known to the transferor.

The Information Commissioner's Office has published guidance to help organisations comply with the Data Protection Act 1998 when providing information about their employees under TUPE and other corporate transactions.

References: ICO TUPE Guidance PDF Format

Non-compliance

The transferee can bring a claim to the employment tribunal. If it upholds the claim, the tribunal will make a declaration to that effect and may award compensation to be paid by the transferor to the transferee.

References: TUPE 2006, SI 2006/246, reg 12

Compensation will be such amount as the tribunal considers just and equitable, having particular regard to any loss incurred by the transferee due to the transferor's non-compliance, subject to a duty to mitigate that

loss. The tribunal will also take account of any contract between transferor and transferee imposing financial penalties for failure to notify it of any employee liability information.

The supposed minimum level of compensation is £500 per employee but the tribunal is able to award less for trivial or unwitting breaches or where it is otherwise just and equitable to do so.

It is not clear whether the loss the transferee can recover will be the value of employees' claims brought against it of which it was not notified or whether it will need to prove that it would have negotiated a price reduction had it known of the claims.

The claim must be brought within three months of the transfer. There is the usual tribunal discretion to extend the time limit where it was not reasonably practicable to do so within three months - perhaps where several years later a transferring employee claims enhanced redundancy rights that were never disclosed.

It is not possible to contract out of these requirements. Claims cannot even be settled by ACAS conciliation or compromise agreements. However, the transferee could agree to indemnify the transferor for any claims it brings.

References: TUPE 2006, SI 2006/246, reg 18