Definition - TUPE

• The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) protects employees' terms and conditions when a business or undertaking, or part of one, is transferred to a new employer (the transferee).
• It applies to all employees who are employed by the transferor (the current employer) and work in the part of the business that is to be transferred.

Definition - TUPE Plus

• Not a legal requirement but builds on TUPE rights.
• Included in the contract is a guarantee that there will be no deterioration in terms and conditions during the life of the contract.
• The contract may also state there will not a two tier system i.e. new starters will be employed on the same/similar terms and conditions of employment.

Key Considerations

There are several key areas which need to be considered when a TUPE transfer takes place. If these are not addressed or managed correctly, they may have implications, these are -

1) Does TUPE Apply?

TUPE applies to what are known as ‘relevant transfers’ which fall into two broad categories -
(i) Business Transfers - a stable economic entity that is transferred and will retain its identity after the transfer.
(ii) Service Provision Changes - when a client who engages a contractor to do work on its behalf is either reassigning from the contract (i.e. contracting out, outsourcing or re-tendering) or bringing the work ‘in-house’ (where a contract ends with the service being performed in-house by the client themselves).

Examples of when TUPE Applies
• Mergers
• Sales of a businesses by sale of assets
• A change of licensee or franchisee
• The gift of a business through the execution of a will
• Contracting out of services
• Changing contractors
• Where all or part of a sole trader's business or partnership is sold or otherwise transferred

Examples of when TUPE does not Apply
• Transfers by share take-over
• Transfers of assets only (for example, the sale of equipment alone would not be covered, but the sale of a going concern including equipment would be covered)
• Transfers of a contract to provide goods or services where this does not involve the transfer of a business or part of a business (usually for one event and for a short period)
• The supply of goods for the client's use (for example, supplying food to a client to sell in its staff canteen, rather than a situation where the contractor runs the canteen for the client)
• Transfers of undertakings situated outside the United Kingdom (although these may be covered by the regulations of other member states)
• Secondments - An Employment Tribunal has confirmed that regardless of the wishes of the transferor, transferee or employees, if TUPE applies a secondment will not be valid and TUPE will automatically apply.
1) Does TUPE apply?

2) **Impact of a Breach of TUPE Regulations**

The table below sets out three different categories for dismissal relating to TUPE and whether they are fair or unfair –

<table>
<thead>
<tr>
<th>Type of Dismissal</th>
<th>Fair or Unfair</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dismissals for which the sole reason is the transfer itself, or a reason</td>
<td>Automatically unfair under the unfair dismissal legislation.</td>
</tr>
<tr>
<td>connected with the transfer that is not an ETO reason.</td>
<td></td>
</tr>
<tr>
<td>Dismissals for which the sole or principal reason is not the transfer itself, but</td>
<td>Potentially fair subject to the normal test of reasonableness under the unfair</td>
</tr>
<tr>
<td>is a reason connected with the transfer that is for an ETO reason.</td>
<td>dismissal legislation.</td>
</tr>
<tr>
<td>Dismissals for which the sole or principal reason is entirely unconnected with</td>
<td>These will fall outside TUPE as they are unrelated to a relevant transfer and</td>
</tr>
<tr>
<td>the transfer.</td>
<td>the usual unfair dismissal principles will apply. This is the case even though</td>
</tr>
<tr>
<td></td>
<td>the dismissals may be made around the time of such a transfer.</td>
</tr>
</tbody>
</table>

Please also see paper on ETO’s.

3) **Consultation**

- The transferor has the responsibility to ensure consultation takes place with employees and Trade Unions but it is recommended that the transferee is involved in the consultation.
- Legislation does not state how long the consultation period should be TUPE legislation states there is an obligation to consult with employees.
- Best practice is for consultation periods to be in line with statutory redundancy consultation i.e. 30 days for less than 100 employees and 90 days for more than 100 employees.
- The consultation period may also be influenced by the pension arrangements (see paper on pensions).
- Failure to conduct reasonable consultation may result in liability for compensation which may be up to 13 weeks’ pay.

Employees who are 'affected' by the transfer include those -

- Who will be will be transferred
- Who may be transferred
- Whose jobs are in jeopardy by reason of the proposed transfer
- Whose job applications within the organisation are pending at the time of transfer

The following information, as a minimum, should be shared during consultation –

- The fact there is a transfer happening
- Approximately when it will happen
- The reasons why it is happening
- The legal, social and economic implications for the affected employees i.e. how the employees will be affected - the effect on employment contracts, statutory rights and collective agreements, work location, etc.
- Options regarding terms and conditions of employment
- What the process relating to the transfer will be
- The employee’s rights in a transfer situation
- The proposed timetable including meetings, decisions, etc.
The process for communication and raising concerns

Employees who do not Want to Transfer - will in effect terminate their contract of employment will no liability to either the transferor or transferee unless their reason for not transferring is because of a substantial and detrimental change to working conditions as a result of the transfer, they may claim that they have been unfairly dismissed

Key Questions

1) What will the process be to keep employees fully informed and involved from the outset?
2) How will employees get access to appropriate advice and assistance at all stages of the process?
3) What will the communications plan include?
4) What will the transition plan, including responsibilities include?
5) How will employees be affected i.e. the effect on employment contracts, statutory rights and collective agreements, work location, etc.?
6) What are the options for employees regarding terms and conditions of employment?
7) What is the process relating to the transfer i.e. timescales, meetings etc.?
8) Are there any time limits by when the transfer must occur and if so will consultation periods/pension implications impact on meeting these timescales?

4) Employee Liability Information

- The transferor is legally required to provide the transferee with employee liability information, at least 14 days prior to the transfer taking place
- The required information includes written information about the employees who are to transfer
- If this information is not provided, the transferee may apply to an employment tribunal for compensation; this starts at a minimum of £500 for each employee for whom information was not fully provided or was incorrect

Key Questions

1) How will the information be collated and presented?
2) What will be the impact of any liability information (see below)?

5) What Liability Passes to the Transferee

- The transferee takes over the liability for –
  - All statutory rights
  - Claims and liabilities arising from the contract of employment e.g. unfair dismissal, discrimination claims, etc. (this excludes criminal liabilities)
  - Discussions regarding disciplinaries, capability cases, long-term sickness cases, any claims or potential claims which could progress through an Employment Tribunal process or civil court, etc. should take place
- It is common for the transferee to insist on a warranty from the transferor that the information that has been supplied in response to its due diligence enquiries is correct - this underpinned by an indemnity in favour of the transferee

Key Questions

1) Are their any liabilities associated with the transferring employees?
2) Do the liabilities have the potential to impact on the transferee?
3) Does SCC want to sign a warranty underpinned by an indemnity in favour of the transferee?