TUPE

Annette Gumbs and Steven Flynn

Barristers

St John’s Buildings
OVERVIEW OF TUPE FOR CLIENT DEPARTMENTS

What is TUPE?

1. TUPE refers to the “Transfer of Undertakings (Protection of Employment) Regulations 2006” as amended by the “Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014”. They apply to organisations of all sizes and protect employees’ rights when the organisation or service they work for transfers to a new employer. The TUPE regulations can apply when activities are outsourced, brought in-house, transferred or a contract for services is moved from one provider to another. Employees from the newly-acquired business, service or contract will transfer automatically to the incoming employer. Their terms and conditions of employment (apart from occupational pensions) and continuity of service transfer with them and they also receive certain protections around dismissal and redundancy.

2. There are impacts for:
   a) the employer who is making the transfer, also known as:-
      o the outgoing employer, the ‘old employer’ or
      o the transferor,
      o or the client (in respect of first generation outsourcing)
      o or the contractor (in second generation outsourcing)
   b) the employer who is taking on the transfer, also known as:-
      o the incoming employer, the ‘new employer’ or
      o the transferee or
      o the contractor (in respect of first or second generation outsourcing)
   c) the affected employees, including any employees remaining with the outgoing employer and existing employees of the incoming employer as well as those who are transferring.
When does TUPE apply?

3. TUPE applies to the private sector, the public sector and the third/not-for-profit sector. There are two situations when the regulations may apply; business transfers and service provision changes. Collectively these are called “relevant transfers”. In some situations a service provision change can also qualify as a business transfer.

4. The type of transfer most frequently encountered in local government is the service provision transfer which is the focus of this paper, however for clearer understanding and context we also look briefly at business transfers.

Business transfers

5. The TUPE regulations apply if a business or part of a business moves to a new owner or merges with another business to make a brand new employer:-

“A transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the UK to another person where there is a transfer of an economic entity which retains its identity.” Reg 3(1)(a) TUPE 2006.

A part of a business might for example be a distribution function of a larger organisation.

6. Under the TUPE regulations, a business is not judged by its name but by the use made of its assets such as the:

a) premises
b) equipment
c) work in progress
d) goodwill (such as the value of a brand name or a customer base)
e) intellectual property
f) employees.
7. To test whether a business has transferred, a useful guide is to see whether the core assets of the business have transferred to the incoming employer and are being used in essentially the same kind of business activity as previously. For labour intensive businesses the core asset is the workforce, so a business transfer may occur just by reason of the transfer of the majority of the staff.

8. TUPE business transfers may occur even where the transfer is within the same group of companies.

9. It is possible for a transferring business (or part of it) to have just one employee. If this is a labour intensive business, there can be a TUPE business transfer.

10. However TUPE will not apply if there are just shares, limited assets and/or equipment transferring to a different owner.

Service Provision Change

11. A service provision change constitutes a transfer within the meaning of TUPE where ...

   “(i) activities cease to be carried out by a person (‘a client’) on his own behalf and are carried out instead by another person on the client’s behalf (‘a contractor’). (also known as outsourcing)

   (ii) activities cease to be carried out by a contractor on a client’s behalf (whether or not those activities have previously been carried out by the client on his own behalf) and are carried out instead by another person (‘a subsequent contractor’) on the client’s behalf; (also known as retendering or second generation outsourcing) or

   (iii) activities ceased to be carried out by a contractor or a subsequent contractor on a client’s behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are
carried out instead by the client on his behalf” (also known as insourcing): see Reg.3(1)(b) TUPE 2006.

12. Service provision changes can involve organisations, charities, the public sector and academies as well as the public to private outsourcing of public services.

13. The service provision change rules under TUPE will not apply if there is just a supply of goods: the transfer must include a supply of services as well: see Reg 3(3)(b) TUPE 2006. Thus a change of supplier providing, say, vending machines will not fall within the definition. TUPE will also not apply if the service is for single-event activities, or for activities of short-term duration (such as an exhibition, a contract for the repair of a factory roof, or a conference): see Reg 3(3)(a)(ii) TUPE 2006.

14. Additionally, the following must exist immediately before the transfer for the TUPE regulations to apply:
   a) an organised grouping of employees: see reg 3(3)(a)(i) TUPE 2006
   b) employees should be assigned to the group
   c) the client should remain the same
   d) the activities should not become overly fragmented
   e) the activities should remain fundamentally the same.

15. The Court of Appeal recently provided some guidance in determining whether a service provision change had occurred in the context of second generation outsourcing:- see Rynda (UK) Ltd-v-Rhijnsburger [2015] IRLR 394 CA para 44, namely:-
   • Identify the service which the outgoing contractor provided to the client.
   • List the activities which the staff of the outgoing contractor performed in order to provide that service.
   • Identify the employee or employees of the outgoing contractor who ordinarily carried out those activities.
• Consider whether the outgoing contractor organised the employee/employees into a ‘grouping’ for the principal purpose of carrying out the listed activities.

16. Another useful approach was identified in the earlier EAT decision of *Enterprise Management Services Ltd v Connect-Up Limited* [2012] IRLR 190 EAT, para 8. There the EAT suggested that to determine whether a service provision change arises under Reg 3(1)(b)(ii), (i.e. second generation outsourcing) the tribunal should:

   (a) identify the relevant activities carried out by the original contractor (in a re-tendering or insourcing situation) or the in-house employees (in an outsourcing situation);

   (b) consider whether the activities are fundamentally or essentially the same as those carried out by the new contractor (outsourcing or re-tendering) or in-house employees (in-sourcing); minor differences can properly be disregarded. Cases may arise where the division of services (or fragmentation) after the relevant date (‘transfer date’) amongst a number of different contractors means that the service provision change regime does not apply.

   (c) Where the activities remain essentially the same before and after the transfer date, the Tribunal should determine whether:

      (i) before the transfer there was an organised group of employees in Great Britain which had as its principal purpose the carrying out of the activities identified on behalf of the client;

      (ii) the client intends that the incoming contractor, post the service provision change, will not carry out the activities in connection with a single event or of short-term duration;

      (iii) the activities are not wholly or mainly the supply of goods (rather than services for the client’s use).
(d) The tribunal must then decide whether each Claimant was assigned to the original grouping of employees.

An organised grouping of employees.

17. The group has to be deliberately organised by the employer to provide a service for a particular client (some groups may include just one person). Employees working together randomly on a client contract are unlikely to meet this requirement: see *Eddie Stobart Ltd v Moreman [2012] IRLR 356 EAT*. Similarly employees who happen to have been working on the same contract for the same client will not necessarily be regarded as being in an organised grouping of workers for that client: see *Seawell Ltd v Ceva Freight (UK) Ltd [2013] IRLR 726 CSIH*.

Employees should be assigned to the group.

18. The roles that transfer should be linked to the delivery of services for a particular client. Employees who carry out activities not related to the contract are unlikely to be part of the group. This could include managers who work on maintaining relations with the client.

Activities should remain fundamentally the same.

19. If the same work is being performed, with the same equipment at the same premises then TUPE is likely to apply. However if the work activities are fundamentally different after the transfer then TUPE will not apply. This would appear to be a straightforward matter but in practice can be quite challenging to determine with far reaching legal consequences.

20. The services carried out by the outgoing contractor/employer and the incoming contractor/employer do not have to be identical, whether as to the activities carried on or the manner in which the activities are performed: see
**Metropolitan Resources Ltd-v-Churchill Dulwich Ltd [2009] IRLR 705 EAT para 30.**

“However, it cannot in my judgment, have been the intention of the introduction of the new concept of service provision change that the concept should not apply because of some minor difference or differences between the nature of the task carried on after what is said to have been a service provision change as compared with before it or in the way in which they are performed as compared with the nature or mode of performance of those tasks in the hands of the alleged transferor. The commonsense and pragmatic approach is required to enable a case in which problems of this nature arise to be appropriately decided as was adopted by the Tribunal in the present case. The Tribunal needs to ask itself whether the activities carried on by the alleged transferee are fundamentally or essentially the same as those carried out by the alleged transferor. The answer to that question will be one of fact and degree, to be assessed by the Tribunal on the evidence in the individual case before it.”

21. In the *Metropolitan* case the EAT upheld the tribunal finding that the activity in question, namely the provision of good quality accommodation to asylum seekers together with associated administration reporting services on behalf of ‘Migrant Helpline’ was the same before and after the transfer, despite the fact that:-

a) the contract was undertaken in a different location;
b) extra services were provided by the transferee;
c) there was a difference in security in relation to the two properties where accommodation was provided.

The EAT held that a difference in location is highly unlikely of its own to be determinative against the existence of a service provision. So too was some additional duty or function in addition to the previous service, unless the addition was of such substance that the activity being carried out was no longer essentially the same as that carried on by the outgoing contractor (para 37).
22. In contrast in the *Enterprise Management Services Ltd-v-Connect-Up Ltd [2012] IRLR 190 EAT*, a change in the work done in the order of 15% was considered a material difference meaning the activities were not fundamentally the same. In *Enterprise* the Tribunal found that the activity in question was the provision of ICT support for administrative and curriculum systems to schools in Leeds. The transferee/incoming contractor was no longer required to undertake ICT support for the curriculum systems. This represented 15% of the work done by the outgoing contractor/transferor. This was found by the Tribunal at first instance to mean that the activities were not essentially or fundamentally the same and was upheld on appeal. This case is of particular interest as one might have considered that a difference of 15% in the work would have been considered a minor difference leading to a determination that there was a service provision change.

23. In the *C S Group (UK) Ltd-v-Jones and Another [2009] UK EAT/0038/09/CEA* the EAT upheld the Tribunal’s finding that the activities had substantially changed in respect of the contractor who provided a full canteen service (where the claimants were Chefs) to a contractor providing 5 dry goods kiosks where there was no requirement for the preparation of hot food, instead selling pre-prepared sandwiches and salads.

24. A reduction in the quantity of work can prevent the work being considered as fundamentally the same pre and post-transfer, such that there is no service provision change:- *See Department for Education-v-Huke [2012] UK EAT/0080/12* where in respect of a contractor providing IT services, the in-house provider/incoming employer expected to undertake a small amount of work that had existed prior to the ‘transfer’ (namely 25% of full-time hours for one person). The amount of this work had diminished over the life of the contract. The EAT considered the reduction in quantity substantial enough to
lead to the conclusion that the activities being carried out were not essentially the same as those before.

25. This is to be contrasted with circumstances where the pre and post-service provision change activities are the same, albeit poorly and undertaken on a skeletal basis:- see London Borough of Islington-v-Bannon [2012] UKEAT/0221/12. This case concerned the Local Authority insourcing the discharge of its statutory duties under the Children’s Act to appoint volunteers to mentor children in its care having previously outsourced this. The Tribunal found that the Local Authority carried out the independent volunteer service as required by statute, as was carried out by the previous contractor, save for recruiting new independent volunteers. At first instance the Tribunal found that the Local Authority’s performance in discharging its statutory duty was unsatisfactory and under-resourced but found that this had not changed the essential examination of what occurred on the change.

26. There are exceptions which mean TUPE may not apply to some service provision situations such as:
   a) those working temporarily in the group
   b) if there is a supply of goods only
   c) if the service is intended to be for single-event activities (such as an exhibition or a conference)
   d) if the service is intended to be for activities of short-term duration.

Activities should not become overly fragmented.

27. The more split up or fragmented the activities become between different providers the less likely it is that the TUPE regulations will apply. In Enterprise Management Services-v-Connect-Up Ltd [2012] IRLR 190 EAT the Tribunal at first instance found that the activity which was the provision of ICT support for administrative and curriculum systems to schools in Leeds, having been serviced by the outgoing contractor, was subsequently serviced by 6 other
providers providing ICT support for administrative systems (rather than also providing curriculum systems ICT support which represented 15% of the work of the outgoing contractor) which was upheld on appeal.

28. The EAT in *Kimberley Group Housing-v-Handley [2008] IRLR 667* found that a relevant transfer of a service provision change may take place when there is more than one transferee, even though there is one transferor. Further, the EAT recognised that there may be some circumstances in which services which were being provided by an outgoing contractor to a client going forward are so fragmented that it is not possible to determine a service provision change as having taken place. In this respect the EAT identified that a Tribunal might want to take into account any difficulties in determining who should take responsibility for an employee’s contract after a given date as indicating that there is no service provision change. However, on the facts of that case where the Tribunal found that 71% of the activities performed at the Middlesbrough location by the outgoing contractor were performed by one incoming contractor (i.e. *Kimberley*) and the remaining 29% of the activities performed by the outgoing contractor were performed by another contractor; and in respect of the Stockton location, 97% of the activity undertaken went to *Kimberley*, a service provision change was found to have occurred.

29. The *Kimberley* case also raises, indirectly, the potential significance of determining what the relevant activities are. *Kimberley* concerned the activity which the tribunal at first instance described as the ‘provision of suitable accommodation and related support services to asylum seekers in Middlesbrough and separately in Stockton’. The staff who brought the proceedings were all concerned with property maintenance. They formed part of two teams of staff (18 staff in total) of which 13 staff were similarly concerned with property maintenance and a further 5 staff who were concerned with welfare and administrative tasks. There is no detail about the nature of the latter tasks. The EAT noted itself in passing that ‘*care may need to be taken by a tribunal in deciding what it is that constitutes the relevant*
activities. If, for instances, here the relevant activities had been described as ‘maintenance operations’ then it is possible that there might have been a different conclusion, but we cannot consider that further.’

Key tips for Incoming Contractors/Transferees in defending TUPE claims

30. The following are potential areas of focus incoming contractors seeking to defend TUPE claims:-

   a) Try to win the battle as to the description of the activities. Consider carefully how to describe the activities undertaken pre and post transfer. Is it possible to describe the activities as narrowly as possible so as to highlight or emphasise differences? It is important to seek advice on this at an early stage so as to seek to establish a consistent narrative in the defence of the case.

   b) Consider whether there was in fact an organised grouping of employees and whether they were purposefully working on the activities in question or fortuitously doing so.

   c) Consider whether any fragmentation is sufficient to undermine the suggestion of a service change.

Key tips for Outgoing Contractors/Transferors in defending TUPE claims

31. Likewise, for outgoing contractors the reverse is true:-

   a) Seek as broad a definition of the activity as possible.

   b) Seek to emphasise the existence of an organised grouping and dedication to the activity identified.

   c) Minimise the impact of any fragmentation.
Who transfers?

32. **Business transfers:** All employees assigned to the business (or part) that is transferring will transfer with it:– *see Botzen -v- Rotterdamsche Drookdok Maatschappij BV [1985] ECR 519 ECJ* and *Duncan Web Offset (Maidstone) Ltd -v- Cooper [1995] IRLR 633 EAT*. It is usually clear who these people are, but it also makes good business sense if the outgoing and incoming employers liaise over who is included in the transferring group.

33. **Service provision transfers:** The position becomes complicated for employees who have split job functions, some of which fall within the transferring business and some which don’t. The amount of time spent on each activity may be a guide but might not be an accurate indicator in all cases. Sometimes it may be necessary to look at other aspects of the job to determine the link between the employee and the work or activities which are performed. Relevant considerations include:–

   a) the amount of time spent on one part of the business or the other
   b) the amount of value given to each part of the business by the employee
   c) the terms of the contract of employment showing what the employee could be required to do
   d) how the cost to the employer of the employees services had been allocated between different parts of the business.

34. Sometimes an outgoing employer will include staff in the group who the incoming employer believes does not belong there. In this situation, the incoming employer should attempt to reach agreement with the outgoing employer about who ought to be in the group as early as possible, and before the transfer takes place. If there is a failure to agree, the incoming employer is advised to seek legal advice on the matter. When a business transfer takes place, all employees engaged by the outgoing employer automatically transfer to the incoming employer at the point of transfer.
35. In a business transfer where only part of the business transfers, all employees assigned to that part of the business automatically transfer to the incoming employer at the point of transfer.

36. In a service provision change, employees assigned to the organised grouping of employees automatically transfer to the incoming employer at the point of transfer.

37. Whilst reference is made to employees it is important to remember that the definition of employee is wider in reg 2(1) TUPE 2006 which provides that:-

“employee” means any individual who works for another person whether under a contract of service or apprenticeship or otherwise but does not include anyone who provides services under a contract for services and references to a person’s employer shall be construed accordingly.

38. Thus the definition includes:-
- someone working under a contract of services
- someone working under an apprenticeship
- a worker within the meaning of s230(3) ERA96.

39. Other employees transferring include:-
- those who have been automatically unfairly dismissed before the transfer where the sole or principal reason is the transfer: see *Litster -v- Forth Dry Dock & Engineering Co Ltd [1989] IRLR 634 HL*
- those who are on maternity leave or long term sick who would have been assigned to the organised grouping before the transfer had they been able to work: see *Fairhurst Ward Abbots Ltd -v- Botes Building Ltd [2004] EWCA Civ 63 CA.*
Who does not transfer?

- Those who are on temporary assignment to the organised grouping.
- Those who have objected to the transfer.
- Those permanently incapacitated and retained to facilitate PHI payments: see *BT Managed Services Ltd v Edwards & Anor UKEAT/0241/14*

Which employment rights and liabilities transfer?

40. Where an employee transfers under the TUPE regulations, the following rights and obligations, powers and liabilities also transfer with them to the incoming employer:

- contracts of employment, including all terms and conditions of employment such as pay, commission and bonus entitlements, holidays, job title and function, and sick pay provisions. There are special rules regarding pensions (see below).
- the employers’ contractual provisions such as job or workplace flexibility or mobility, restrictive covenants, or restrictions on outside work where this applies.
- seniority – the right to have an employee’s entire length of service taken into account in calculating rights of a financial nature, e.g. termination payments: see *Collino v Telecom Italia SpA [2002] ICR 38 ECJ*. Continuity of service is preserved by s218(2) Employment Rights Act 1996.
- accrued entitlements such as where a bonus or holiday entitlement has built up over a period of time, but has yet to be taken or paid.
- liability for the outgoing employers’ acts and omissions in respect of the transferring employees are passed across under the TUPE regulations to the incoming employer. This includes:-
  - unfair or wrongful dismissal of employees (unrelated to the transfer) e.g. conduct or capability dismissals;
- equal pay claims: *Gutridge -v- Sodexho Ltd [2009] IRLR 721 CA* although it is worth noting that employees only have 6 months from the date of transfer to bring such claims;
- personal injury claims: *Bernadone -v- Pall Mall Services [2000] IRLR 487 CA* (although note the right to indemnity under the outgoing employer’s, EL policy transfers also – assuming the outgoing employer has such a policy).

41. Employees who transfer from the outgoing employer to the incoming employer are not regarded as dismissed under TUPE, so a transfer does not trigger an entitlement to redundancy pay or pay in lieu of notice unless there is an actual dismissal. The incoming employer takes over any collective agreements made by or on behalf of the outgoing employer in respect of any of the transferring employees and which were in force at the point of transfer. These will include terms and conditions of employment negotiated through collective bargaining as well as the wider employment relations arrangements. Examples include the collective disputes procedure, time off facilities, training for union representatives, negotiated redundancy procedures or job security arrangements and flexible working arrangements.

42. Where the collective agreement is renegotiated and the incoming employer is not a party to the negotiations the employer does not inherit the new terms and conditions (thus the collective agreement provides so called ‘static’ rather than ‘dynamic’ rights: see *Parkwood Leisure Ltd -v- Alemo-Herron [2013] IRLR 744 CJEU* and reg 4A TUPE 2006\(^1\))

43. Under the TUPE regulations, union recognition only transfers where the business unit keeps its identity and is not merged into the incoming employers’ wider organisation. However to maintain good employment relations, the incoming employer should discuss ongoing collective representation

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\(^1\) With effect from 31.01.14.
arrangements for the transferring employees with the appropriate trade unions, ideally ahead of the transfer.

**Employee liability information**

44. Under TUPE regulations the following employee liability information must be provided:

- identities of the transferring employees
- age of the transferring employees
- employment particulars of the transferring employees
- active/live disciplinary and grievance records from the last two years of the transferring employees
- any collective agreements which are in force
- any court or tribunal claims the transferring employees brought against the outgoing employer within the previous 2 years or which the outgoing employer has reasonable grounds to believe an employee may bring against the incoming employer: reg 13(2) TUPE 2006.

- Suitable information relating to the use of agency workers, namely:-
  - The number of agency workers working temporarily for and under the supervision and direction of the employer;
  - The parts of the employer’s undertaking in which those agency workers are working; and
  - The type of work those agency workers are carrying out: reg13(2A) TUPE 2006.

45. The information must be accurate, up-to-date and secure, and must be provided not less than 28 days before the transfer.\(^2\) If the information is not provided within this time, the incoming employer may apply to an employment

\(^2\) Or if special circumstances make this not reasonably practicable, as soon as reasonably practicable thereafter: see reg 11(6) TUPE 2006.
tribunal for compensation which starts at a minimum of £500 for each employee for whom the information was not provided or was incorrect.³

46. Outgoing employers often receive requests for information either not included within the TUPE requirements or at the early stage of the bidding process. Where possible they should release the information in an anonymised form so that the individuals cannot be identified but otherwise only with the consent of individual affected employees.

INFORMING AND CONSULTING STAFF

47. The outgoing employer is under an obligation long enough before a relevant transfer to enable the employer of any affected employees to consult the appropriate representatives of any affected employees: reg 13(2) TUPE 2006. “Long enough before” is unhelpfully vague but the Acquired Rights Directive (Directive 77/187/EC as revised and consolidated in Directive 2001/23) would suggest it means “in good time”: see Art. 7. Clearly what in good time means will be circumstance specific and dependent on the extent of the changes likely to occur. A period of 10 business days has been held to be insufficient where the changes involved a potential restructure and consequential redundancies: see LLDY Alexandria Ltd (Formerly Loch Lomond Distillery Company Ltd) v Unite The Union and another [2014] UKEAT 0002/14.

48. Under the regulations the employer of any affected employees must inform the employee representatives of—

(a) the fact that the transfer is to take place, the date or proposed date of the transfer and the reasons for it;

(b) the legal, economic and social implications of the transfer for any affected employees;

(c) the measures which he envisages he will, in connection with the transfer,
take in relation to any affected employees or, if he envisages that no measures will be so taken, that fact; and

(d) if the employer is the transferor, the measures, in connection with the transfer, which he envisages the transferee will take in relation to any affected employees who will become employees of the transferee after the transfer by virtue of regulation 4 or, if he envisages that no measures will be so taken, that fact: see reg 13(2) TUPE 2006.

Colloquially the letter in which such information is conveyed by the employer is known as the ‘measures’ letter.

49. Where there is more than one reason for the transfer, all reasons should be provided. In *LLDY Alexandria Ltd (Formerly Loch Lomond Distillery Company Ltd) -v- Unite The Union and another [2014] UKEAT 0002/14*, the EAT upheld an employment tribunal’s decision that the transferor was in breach of its obligations under regulation 13(2) because it failed to mention all of the reasons for the transfer. The employment tribunal found that one of the reasons for the transfer was an unresolved pay dispute between the transferor and the relevant union, which was not referred to in the measures letter to the appropriate representatives.

50. The duty under regulation 13 to provide information is only a duty to provide the information to the appropriate representatives, not to the employees personally. Where an employer recognises a trade union it must inform the union: reg 13(3)(a) TUPE 2006. Where there is no recognised trade union it must consult existing employee representatives or representatives elected specifically for the purpose of the transfer: reg 13(3)(b) TUPE 2006.

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4 Unless the employees fail to elect representatives within a reasonable time in which case the employer has to give the information to any affected employees directly: reg 13(11) TUPE 2006.
51. The information must be given to each of the appropriate representatives, either by being "delivered" to them, or sent by post to an address they have provided to the employer or (in the case of representatives of a trade union) to the union's head or main office (reg 13(5), TUPE 2006). While TUPE does not explicitly state that the information must be given in writing, the tribunal in NALGO -v- British Waterways Board interpreted the requirement for the information to be "delivered to them, or sent by post" as implying a requirement for it to be given in writing, rejecting the argument that the information could be "delivered" orally.

**Who are affected employees?**

52. This refers to:

- employees of the outgoing employer that will or might be transferred;
- employees of the outgoing employer who are not being transferred but whose jobs are in jeopardy by reason of the transfer;
- employees who have job applications within the organisation pending at the time of the transfer: see Unison -v- Somerset County Council [2014] IRLR 207 EAT;
- employees of the incoming employer whose jobs may be affected as a result of the transfer.

**CONSULTATION**

53. The obligation to consult (as opposed to simply inform) arises where the employer of an affected employee envisages that it will take measures in relation to the affected employee in connection with the transfer: reg 13(6) TUPE 2006. The purpose of the consultation is with a view to seeking agreement to the intended measures, i.e. good faith negotiations over the intended measures.
54. A failure to inform and consult can give rise to a claim to the employment tribunal by the trade union, employee representative or employee (as applicable) and can give rise to compensation to a maximum of 13 weeks gross pay⁵: reg 16(3) TUPE 2006.

55. Where the measures identified envisage redundancies of 20 or more employees such that the duty of collective consultation under s188 the Trade Union and Labour Relations (Consolidation) Act 1992 (‘TULR(C)A’) is engaged, the Collective Redundancies TUPE (Amendment) Regulations 2014 adds new sections (198A and 198B) to TULR(C)A, permitting early, pre-transfer, consultation undertaken by a transferee to now count towards collective redundancy consultation obligations. There are, however, conditions attached to the operation of these provisions. These are:

- The transferee must give the transferor written notice that it intends to engage in pre-transfer consultation, and
- The transferor must agree in writing (and may also withdraw this consent at any time).

56. The transferee is also only given one opportunity. Where pre-transfer consultation is cancelled at any time, it cannot resurrect the process subsequently (new section 198A(6)(d) TULR(C)A).

⁵ Which is not subject to a statutory cap: see Zaman -v-Kozee Sleep Products Ltd (t/a Dorlux beds UK [2010] UKEAT/0312/10.
TUPE AND PENSIONS

57. Contractual terms of collective agreements relating to occupational pension schemes do not transfer under TUPE: see reg 10(1)(a) TUPE 2006. The TUPE Regulations do not define occupational pension scheme. The definition is derived from s1(1) Pension Schemes Act 1993 which establishes that an occupational pension scheme:-

a) aims to provide benefits to, or in respect of, people in a particular employment or employments;

b) is established by (or by persons who include) the employer, a relevant employee or an interested body; and

c) the administration of the scheme must fall within either the UK or another country outside the EU.

Private Pension Schemes

58. If a scheme does not fall within the above definition it is not an occupational pension scheme. Thus a private pension scheme in which an employer agrees in a contract of employment to make contributions to an employee’s personal pensions scheme will transfer.

59. Provisions of occupational pension schemes not relating to benefits for old age, invalidity or survivors are not treated as being part of an occupational pension scheme: reg 10(2) TUPE 2006. Thus:

Redundancy Benefits

a) Pension enhancements on redundancy are not part of an occupational pension scheme and do transfer.

Where an occupational pension scheme provided, in the event of redundancy for early payment of a retirement pension, early payment of a lump sum on retirement and compensation in the form of an annual allowance which were
not paid on redundancy following transfer from the NHS to the private sector. The ECJ held that these redundancy benefits could not be classed as old age benefits because they were not paid at the end of working life and thus fell outside of the pensions exception: see *Beckmann -v- Dynamco Whicheloe Macfarlane Ltd [2002] IRLR 578 ECJ*.

**Early Retirement Benefits**

b) Early retirement benefits contingent upon dismissal or the grant of early retirement by agreement with the employer are not old age, invalidity or survivors benefits and do transfer:- see *Martin -v- South Bank University [2002] IRLR 74 ECJ*. Consequently an incoming employer cannot offer transferring employees less favourable early retirement terms than those offered by the outgoing employer.

c) The right to retire early (with the employer’s consent) pre transfer gives rise to a right post transfer to a good faith consideration of an application for early retirement: see *Proctor & Gamble Company -v- Svenska Cellulosa Aktiebolaget SCA [2012] IRLR 733 Ch*.

60. In a transfer situation, the incoming employer must assess the transferring employees on the date of transfer and auto-enrol them for pension purposes if they are eligible.

**Fair Deal 2013**

61. TUPE transfers from the public to private sector are subject to a policy contained in various government-issued guidance documents collectively known as "Fair Deal". Fair Deal 2013 was published on 4 October 2013. This confirms that employees due to be transferred are entitled to remain in their current public-sector pension scheme. Similarly, on a re-tendering of an existing contract, employees will be able to transfer back into the public-sector pension scheme to which they would have been entitled to be a member before the original transfer.
62. Whilst occupational pensions do not transfer under TUPE, if the transferred employees were members of an occupational pension scheme, the incoming employer must offer them a pension which is either:-

- final salary or career average pension
- a non-money purchase (defined benefit) occupational pension scheme, or a scheme that provides the same benefits to those of the old employer’s scheme, or
- a money purchase (defined contribution) occupational or stakeholder pension scheme to which the new employer must make contributions equalling the amount contributed by the outgoing employer to the scheme: s257 and s258 Pensions Act 2004.

Annette Gumbs & Steven Flynn

St John’s Buildings

February 2016

For further information or to sign up to receive our forthcoming TUPE reports:-

TUPE: Changing Terms and Conditions
TUPE: Business Protection for transferors and transferees (indemnities and warranties)
TUPE: The Pension Dimension

Please contact:-

Rob Lang

Assistant Senior Clerk Employment and Commercial

0161 214 1542 or Rob.Lang@stjohnsbuildings.co.uk