TUPE: How Recent Changes May Affect Your Hospitality Business

The Institute’s members regularly enquire about a complex piece of legislation called the Transfer of Undertakings (Protection of Employment) Regulations, better known as “TUPE”. The UK’s Coalition Government reports that between 26,500 and 48,000 TUPE transfers take place each year, affecting between 1.42 million and 2.11 employees annually. The Institute’s Enquiry Service regularly receives calls for TUPE guidance which is available to members on BusinessHR’s website and Helpline. Many of BusinessHR’s Helpline calls on TUPE relate to service provision changes—a common occurrence in the hospitality industry.

The present legislation changes to TUPE affect England and Wales, but businesses in Northern Ireland may have employees or subsidiaries within Great Britain that are affected and Northern Ireland may still decide to implement similar changes. It’s important to stay current with the TUPE legislation throughout the UK.

INTRODUCTION

Before examining the changes being made to TUPE the following outlines a few basic points about these regulations.

The aim is to protect employees who work in a business, or part of a business, which is transferred or merged with another organisation.

The first question to answer in respect to whether TUPE applies is: ‘Are the employees moving to a new employer?’ So for example, if all that is happening is that the shares in the business are being bought by a new owner then TUPE probably will not apply. This does not mean that the new owner can make changes to the employees’ terms and conditions, benefits, pay, etc. Just that the rules covering such a change are not TUPE related.

There are two types of transfer where TUPE will apply: a ‘business transfer’ and a ‘service provision change’:

- **A business transfer** occurs when a business or trade (or part of it) situated in the UK immediately before the transfer is moved into another organisation, then TUPE will apply and most of the employee’s terms and conditions will be protected. This also includes mergers or a change of licensee, franchisee or a concession.

- **A service provision change** is, as the name suggests, when there is a change to who is providing the service. This can occur in several ways:
  - When a service is contracted out to another organisation.
  - When the provision of a service is transferred from one contractor to another.
  - When the provision of the service previously provided by a contractor is brought back in-house.

Fundamentally, when such situations arise the employees’ terms and conditions are protected. The only major exception is occupational pensions but even here the new employer has to make some provision.

Other issues such as trade union recognition, share schemes or where the work to be transferred is split between—for example—two contractors, raise difficult questions. There isn’t room here to discuss them all, but members can read a comprehensive legal overview on the BusinessHR website.

The only way an employer can make changes is when there is an economic, technical or organisational reason (ETO). It is often highly risky to make changes for this reason if it only affects the incoming staff. Again see the BusinessHR guide for more information on this subject.

Finally, before reviewing the changes, there are a couple of areas to be careful about:

- Firstly, there have been a number of cases where an establishment has closed down and at a later date been reopened offering the same or similar service e.g. hotel, restaurant. Depending on the
length of the closure and the degree of similarity in the service provided it has been ruled that the staff employed before the closure are covered by TUPE.

- Secondly, even if the service is provided by one person this person is covered by TUPE if the provision of the service is transferred to a new provider.

The law on TUPE is complex and is being amended during 2014. The key elements of that change are outlined below.

### Changes in 2014

The main changes to the TUPE Regulations are as follows:

#### As from 31 January 2014:

- **Service Provision Changes (SPCs)**
  
  This change clarifies what is covered by a Service Provision Change.
  
  - For there to be a service provision change, the activities carried out by the new contractor must be ‘fundamentally or essentially the same’ as those carried out by the previous provider before the transfer. So employees who are ‘assigned’ to a contract that transfers will continue to be protected by TUPE.
  
  - In other words, if a service is provided by an assigned group of employees then they would transfer under TUPE if the provision of that service transfers. However, this becomes a much more difficult situation if the service is provided by a number of different employees from a bigger pool of staff. The result could be that the service transfers, but you are left with the employees!

  Note that TUPE does not apply where the activities are carried out in connection with a single specific event or a task of ‘short-term duration’ (for example, a hospitality event where contractors are used for the duration of the event).

- **Relocation**
  
  Prior to this change any dismissal that took place due to a relocation of the work / employees was automatically unfair unless, like other fair dismissals, it was for an ETO reason. In other words, relocation on its own was not an ETO reason.

  Now, relocation of a workforce falls within the definition of an ETO so genuine redundancies owing to a change in location will no longer be automatically unfair.

  This change – combined with the change to redundancy consultation described below – is a welcome move. Employers should:

  1. Still consider each situation carefully as it is likely that the distance of the proposed relocation can be an important factor especially when combined with the level of staff involved.
  2. Examine the contracts of the staff involved in terms of any relocation clause. Again this is likely to be more important the more senior the staff.
  3. Follow the correct redundancy procedures, especially in terms of consultation when implementing such redundancies.

- **Changes to terms and conditions**
  
  Prior to 31 January 2014, changing the terms and conditions of transferred employees was only lawful if:

  - the changes are unrelated to the transfer;
  - there is an ETO reason (see above) entailing changes in the workforce; or
  - the transferor is insolvent (in which case special rules apply).

  Any changes made outside of these parameters would be automatically unlawful and would be void. This applies even if the change is beneficial to and accepted by the employee.

  Changes to employees’ terms and conditions will continue to be void if the sole or principal reason is the transfer. However, for transfers taking place after

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**Temporary Closure does not stop TUPE applying**

Mr Wood worked as a bar steward for Caledon Social Club Ltd, which held (via a third party) an occupational licence of a community centre owned by London Colney Parish Council. In June 2008, the council withdrew the centre’s alcohol licence. As a result of this, Caledon Social Club dismissed Mr Wood and, on 16 September 2008, surrendered its occupational licence to the Parish Council. The Parish Council applied for its own alcohol licence and, after a few weeks of inactivity, the bar reopened on 6 October 2008.

Mr Wood claimed unfair dismissal as he should have been transferred under TUPE.

The Employment Appeals Tribunal (EAT) agreed that there had been a temporary cessation of the bar operation, and that it was plain that, by 16 September 2008, the Parish Council intended to obtain a new alcohol licence and reopen and operate the bar in precisely the same manner as Mr Wood’s former employer. Therefore Mr Wood should have transferred.
31 January 2014, the new employer can rely on any pre-existing clauses within the employment contracts to change the contract terms, in the same way the transferor, i.e. old employer, could have done.

So unilateral changes that would be permitted under the contract (such as changes to duties, job titles, new or revised shift patterns, or relocation under a mobility clause) are allowed.

Employers still need to be careful if the change is detrimental to the employee as the BIS guidance suggests only beneficial variations would be permissible and that any detrimental changes will remain void and so could be challenged. Note that the Regulations now provide that the employer and employee must agree to a variation made where there is an ETO reason.

- **Collective agreements**

Where an employer took over employees covered by a Collective Agreement it has been unclear whether the employees could claim that any future agreements that were negotiated by a body, of which the new employer was not a member, would apply to the transferred employees.

In future the negotiated terms and conditions are frozen and may be renegotiated by the new employer one year after the transfer, provided the changes are ‘no less favourable overall to employees when considered together’. The meaning of ‘less favourable overall’ is unclear and only future case law will provide clarification.

- **Redundancy consultation**

Employers have a duty to collectively consult for a minimum 30 or 45 day period if 20 or more redundancies are proposed at one establishment within a 90 day period.

Until now, the new employer could not start the redundancy consultation exercise until after the transfer has taken place.

An amendment to the Trade Union and Labour Relations (Consolidation) Act 1992 will allow pre-transfer consultation undertaken by the transferee with representatives of transferring employees to count towards the collective redundancy consultation obligations. So both periods of consultation (redundancy and TUPE) may run concurrently.

However, there are some hurdles:

1. The transferee and transferor must give written notice to the transferee of the consultation and it may be worth considering having a written co-operation and indemnity agreement that will protect both parties.
2. The transferee must give written notice to the transferor of the consultation and it may be worth considering having a written co-operation and indemnity agreement that will protect both parties.
3. The transferor will have to permit access to transferring employees, and the consultation must be ‘meaningful’.
4. Whilst the transferor must agree to the pre-transfer consultation, the transferee is not obliged to give the transferee any information or assistance.
5. If the transferee decides to end the consultation process early (for example, if it proves impossible to gain sufficient access to the employees, or there is insufficient information to make the consultation meaningful), it is not possible to restart it again before the transfer takes place.

Note also that even where redundancies are anticipated, the employees will still need to transfer before any notices of dismissal are issued by the transferee: the transferor cannot lawfully dismiss because, as the out-going employer, it cannot demonstrate any ETO reason.

If you decide to go ahead with this, do ensure that your selection process is fair and that you have clear, documented evidence of your consultation process.

Whilst this change only applies to collective consultation there would appear to be no reason why, when smaller numbers are involved, individual consultation should not commence prior to the transfer.

Be cautious of using settlement agreements in any of these situations as they must cover both the transferor and the transferee because if they do not the employee could still make a claim against the uncovered employer.

**As from 1 May 2014:**

- **Employee liability information**

The time frame for the transferor to provide employee liability information to the transferees will be extended to 28 days (from 14 days) before the transfer. The content of the required information (identity and ages of those transferring, terms and conditions, collective agreements, disciplinary and grievance history, details of any legal action, etc.) remains unchanged.

This change recognises the practical issues involved in transferring staff. However, the value of undertaking a thorough due diligence prior to taking on a contract cannot be overestimated. Many
employers have had nasty surprises following a transfer, for example where employees have enhanced terms which could make the contract less viable or attractive than previously thought.

Therefore, whenever possible, a transferor should try and get some form of indemnity and warranty if the information turns out to be misleading or incorrect.

As from 31 July 2014:

- Consultation for micro-businesses

Businesses with 10 or fewer employees (‘micro-businesses’) will be allowed to inform and consult directly with individuals when there is no recognised union or existing employee representatives (rather than having to set up elected representatives).

Unfortunately, the government did not go further and apply this to the numbers of staff to be affected by the transfer rather than the total numbers in the business.

Future changes - pensions

As mentioned above, we still await a date for The Transfer of Employment (Pension Protection) (Amendment) Regulations 2013 to come into force. These will bring the pension protection afforded by TUPE into line with the pension auto-enrolment provisions.

And there is a change that also affects TUPE in the Immigration Bill - if passed, this will extend the period that a new employer has from the date of transfer to complete right-to-work checks for migrant employees from 28 days to 60 days.

Zero Hours workers covered by TUPE

The EAT in Pulse Healthcare v Carewatch Care has ruled that carers working under a zero hours contract were employed and so continuity preserved. When the PCT moved a contract from Carewatch Care Services Ltd to Pulse Healthcare the carers argued that TUPE meant they could claim against the new contractor when dismissed.

The EAT agreed that the carers were employees and that they had continuous service even though the carers were employed on a zero hours contract which stated that there was no obligation to provide work and the employees were free to work for another employer. As they had sufficient continuity of employment the carers could claim unfair dismissal.

FURTHER RESOURCES

ACAS – TUPE Changes 2014

BusinessHR - free member access to over 70 customisable documents, letters, contracts and templates for use in your own business. Find them at: www.instituteofhospitality.org/info_services/BusinessHRServices

CIPD – TUPE guidance
www.cipd.co.uk/hr-resources/factsheets/transfer-of-undertakings-tupe.aspx

GOV.UK – Transfers and takeovers including TUPE information
www.gov.uk/transfers-takeovers

Institute of Hospitality Webinar: TUPE Legislation; The Changes WILL Affect You – presented by Philippa Barnes, HR Insight, this webinar discusses the new changes to the Transfer of Undertakings (Protection of Employment) Regulations (TUPE) legislation in the UK in 2014. Find the webinar in the Institute’s Online Catalogue by searching its title.

www.instituteofhospitality.org/info_services/online_catalogue

This guide was compiled by BusinessHR, experts in the provision of human resources support and guidance to managers and supervisors responsible for people matters. As part of their member benefits package, Institute of Hospitality members have FREE access to the BusinessHR website as well as specially reduced rates for use of the BusinessHR Helpline. Members (MIH) and Fellows (FIH) of the Institute have access to one free annual Helpline call. For further information regarding BusinessHR benefits and resources, contact the Institute’s library at: library@instituteofhospitality.org or ring 020 8661 4900.

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