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Key Issues

- Is it a TUPE transfer?
- Who transfers?
- What liabilities transfer and remain?
- Changing terms and conditions.
- Information and consultation.

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Objectives

- Understand when TUPE applies.
- Understand the responsibilities imposed by TUPE.
- Be able to recognise potential problem areas and act appropriately.

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What is TUPE?

- Acquired Rights Directive 77 / 187
- Transfer of Undertakings (Protection of Employment) Regulations 1981
- Transfer of Undertakings (Protection of Employment) Regulations 2006

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Why is TUPE Important?

TUPE provides employees with protection in that it:-

- Prohibits dismissals in connection with a transfer
- Preserves terms and conditions of employment after the transfer
- Provides the right to be informed and consulted about the transfer

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When Can TUPE Apply?

- Sale of a business as a going concern
- Contracting out of a particular business activity
- Contracting that business activity back in
- Contractor change ("2nd generation contracting")

N.B. TUPE is a matter of law - not a choice

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Does TUPE Apply? (1)

Test 1: Test for service provision change

- Is the service currently provided by an organised and identifiable team of employees who carry out the activity?
- Is the team dedicated to that activity?
- Does new provider intend to continue the activity?

If yes, TUPE will apply.

If no to at least one, test 2 must be applied

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Does TUPE Apply? (2)

Test 2 (service provision where test 1 not met and / or other transfers)

Starting Point – Transfer of a Stable Economic Entity:

"A transfer of an undertaking, business or part of an undertaking or business to another employer where there is a transfer of an economic entity which retains its identity".

E.g. Sale of a business as a going concern

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Does TUPE Apply? – Public Sector Issues

Cabinet Office Statement of Practice: public sector bodies must act as if TUPE applies – whether it does or not

GAD Certificate of Comparability

Two tier workforce code

NHS retention of employment model – to avoid TUPE transfers employees remain "employed" by the NHS body and are "seconded" to the private sector

Positive equality obligations

Equal Pay

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Holding on to Key Staff: Who Transfers?

Only **employees** employed in the business immediately before transfer

Contractors and agency staff do not TUPE transfer, but beware "employee status" arguments

Only those working in that part of business will transfer

Those who would have been so employed had they not been dismissed **by reason of the transfer**

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Are They Employed in the Part Transferred?

Factors to consider:-

- The amount of time spent in the operation by the employee
- Value given to each operation by the employee
- Terms of the employee's contract (particularly duties and place of work)
- How the 'cost' of that employee is allocated within the business

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What Transfers? (1)

- Contracts of employment transfer as if originally made between the transferee and employee
- All statutory, contractual and service based employment rights transfer

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What Transfers? (2)

Entitlements to:

- terms and conditions of employment
- collective agreements

Benefits:

- pension
- early retirement and enhanced redundancy entitlements

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What Transfers? (3): Liabilities

- Liability for arrears of pay
- Outstanding claims
- Dismissal liabilities
- Discrimination claims
- Personal Injury/ Tort
- Protective Awards

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Liabilities that Remain with the Transferor

- Criminal liability
- Tax and national insurance

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**Managing the Ongoing Relationship:
TUPE Related Dismissal**

- Automatically unfair if in connection with a transfer
- Unless for "an economic, technical or organisational reason which entails changes in the workforce" (ETO defence)
- Normal unfair dismissal procedure rules apply
- ETO = reasonable business decision relating to the conduct of the business

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Harmonising Employment Terms

Variations unconnected with the transfer permitted

Variations for which the sole or principal reason is not the transfer itself, but is an ETO reason connected with the transfer permitted provided agreement reached

A variation for which the sole or principal reason is the transfer itself not permitted even with agreement

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Employee Liability Information

Identity and age

Particulars of employment (s1 ERA 1996)

Information about **some** disciplinary/grievance procedures

Information about court or tribunal cases in last 2 years (or reasonable grounds to believe will be brought)

Information about collective agreements which still have effect post-transfer

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Employee Liability Information (2)

Timescale – at least 14 days before transfer (i.e. completion)

Updates to be supplied

£500 tribunal award for each employee where obligation not complied with or information defective

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Information and Consultation Obligations

With trade union reps

No set period for consultation, but "long enough before the transfer to enable meaningful consultation to take place"

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Information to be Provided

Fact of transfer
Approximate date of transfer
Reasons for transfer
"Social, legal & economic" implications
"Measures" proposed by transferor or envisaged by transferee

Transferee's Obligations

To provide information on measures it proposes to enable transferor to consult

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Is There a Duty to Consult?

Only if "measures" are proposed otherwise simply an obligation to inform

"Measures" include redundancies and any proposed changes to terms and conditions

Confidentiality issues

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Practical Issues:

- What is consultation?
- Confidentiality
- Consulting with individual employees

Penalties for Failure to Consult:

- Up to 13 weeks' wages for each affected employee
- Joint and several liability

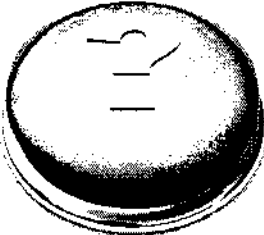
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Managing TUPE – Contractual Provisions

Document the agreement:

- list transferring employees
- division of liabilities
- informing and consulting obligations

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Any Questions?
