



**THOMPSONS**  
S O L I C I T O R S

**STANDING UP FOR YOU**

An overview of the  
Transfer of Undertakings  
(Protection of Employment)  
Regulations 2006

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# Our pledge to you

**Thompsons Solicitors has been standing up for the injured and mistreated since Harry Thompson founded the firm in 1921. We have fought for millions of people, won countless landmark cases and secured key legal reforms.**

We have more experience of winning personal injury and employment claims than any other firm – and we use that experience solely for the injured and mistreated.

## **Thompsons will stand up for you by:**

Staying true to our principles – regardless of how difficult our job is made by government, employers or the insurance industry

Remaining committed to the trade union movement, working closely with them and with professional associations for the benefit of working people everywhere

## **Thompsons pledge that we will:**

Work solely for the injured or mistreated

Refuse to represent insurance companies and employers

Invest our specialist expertise in each and every case

Fight for the maximum compensation in the shortest possible time

*standing up for you*

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The Spirit of Brotherhood  
by Bernard Meadows

## TUPE – an overview

The 2006 Transfer of Undertakings (Protection of Employment) Regulations (TUPE) were introduced in the United Kingdom in 1981 to implement the EU Acquired Rights Directive.

They apply to transfers involving for-profit as well as not-for-profit ventures, in (and to and from) the private and public sectors and provide employees with some protection in the event of a transfer of the undertaking in which they work. These rights include:

- the automatic transfer of employment and employment obligations (except pensions)
- safeguards against dismissal and changes to terms and conditions
- information and consultation rights.

Following a consultation in 2013, the government introduced changes to the 2006 regulations in January 2014 as well as to the collective redundancy consultation provisions in the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA). It also published updated guidance to the amended regulations.



## When does TUPE apply?

TUPE applies in two situations - where there is a transfer of “an economic entity which retains its identity” (known as Standard Transfers); and/or where “activities” cease to be carried out by one person and are instead carried out by another (known as Service Provision Changes – or SPCs). Excluded from both are “transfers involving the administrative reorganisation of public administrative authorities”. Nonetheless, TUPE does generally apply to the public sector.

Introduced in 2006 as a solution to problems associated with outsourcing, SPCs are unique to the UK. Immediately before the transfer, there must be an organised grouping of employees whose principal purpose is carrying out activities for the client; the client must have an intention that the activities after the transfer will cover more than a single specific event or task of short term duration; and the activities must not consist mainly of the supply of goods.

In its 2013 consultation, the government branded SPCs as unwarranted “gold-plating” of the Directive, which should be abolished. In the face of widespread consensus from employers and trade unions that they should be retained, the government was forced to back down. In the end, it only made a minor adjustment to the requirements of an SPC which is that the activities after the transfer must be “fundamentally the same” as those before the transfer.

Further protection is provided in the public sector by the Cabinet Office Statement of Practice, which operates on the basis that TUPE should be treated as applying except in exceptional circumstances. Two other public sector Codes of Practice have been revoked.



## Who does TUPE apply to?

TUPE applies to employees permanently “assigned” to the undertaking (or part of it) to be transferred. The percentage of time spent working for one part of the business is one factor, but is not determinative in isolation.

Employees do not have to transfer if they do not want to, but an employee who objects to transferring will be treated as having resigned, with no entitlement to a redundancy payment or compensation.

## What transfers?

All the rights and obligations under the employment relationship transfer. This includes rates of pay and other terms and conditions, with the exception of pension rights.

From 31 January 2014, terms derived from collective agreements are treated differently in that they are frozen at the point of transfer if the new employer is not party to the collective bargaining machinery. Only terms from those collective agreements in force at the date of transfer apply.

## Variations to terms and conditions

From 31 January 2014, variations where the sole or principal reason is the transfer itself are void. But variations for an “economic, technical or organisational reason entailing changes in the workforce” (ETO) are permitted if the employee agrees, or if they are permitted by the terms of the contract. “Entailing changes in the workforce” has now been amended to include not just a change in headcount or job description, but also a change in job location.

Also from 31 January 2014, terms derived from collective agreements may be varied by agreement even if the reason for the variation is the transfer; provided that the varied terms take effect at least one year after the date of the transfer and overall the varied terms are no less favourable than those applying before the variation.

The government wanted to amend TUPE to allow harmonisations of terms and conditions, but had to conclude that this was not permitted by the Directive.

## Dismissals

**Again from 31 January 2014, dismissals where the transfer is the sole or principal reason are automatically unfair. But dismissals for an ETO reason, now extended to cover a change of job location, are potentially fair.**

Employees are entitled to treat themselves as dismissed if the transfer involves a substantial change in their working conditions to their material detriment. This course should only be adopted after careful advice.

## Insolvency

**Employment is not transferred when the outgoing employer is the subject of insolvency proceedings opened with a view to their assets being liquidated (compulsory liquidation or creditors' voluntary liquidation) and which are under the supervision of an insolvency practitioner.**

Where the outgoing employer is subject to insolvency proceedings not designed to liquidate their assets, liabilities up to the maxima under the statutory protection schemes do not transfer and are instead paid from those schemes. In addition employers are not prevented from agreeing to "permitted variations" to terms and conditions. These are changes where the sole or principal reason is the transfer and which are designed to safeguard employment opportunities.



## Employee liability information

The outgoing employer must provide information about the employment liabilities of the transferring workforce, including details of workers' age and identity, and details concerning disciplinaries and claims. From 31 January 2014, the information must be provided at least 28, instead of 14, days before the transfer. But there is still no requirement for the information to be made available to trade union representatives.

## Information and consultation

**“Long enough before the transfer to enable consultation to take place”, the outgoing employer must inform the appropriate representatives of:**

- (i) the fact of the transfer; the date and the reasons for it
- (ii) the legal, economic and social implications of the transfer for any affected employees
- (iii) the measures the outgoing employer envisages that they will take in relation to affected employees in connection with the transfer; and
- (iv) the measures the outgoing employer envisages that the new employer will take in relation to affected employees in connection with the transfer.

Affected employees are not necessarily just those employees who are transferring. Information must now also be provided in relation to agency workers. This includes the number of agency workers, which part of the undertaking they are working in and the type of work carried out.

If there is no recognised trade union, employers have to organise the election of employee representatives. From 31 January 2014, micro-businesses (those employing fewer than 10 employees) are permitted to inform and consult directly with the workforce if no elections have taken place.

An employer who envisages taking measures in relation to affected employees in connection with the transfer must consult with the appropriate representatives "with a view to reaching agreement".

If an employer fails to inform and consult, employees can apply to the Employment Tribunal within three months of the date of the transfer. It can make an award of up to 13 weeks' pay to affected employees. The outgoing and the new employer may be jointly and severally liable. There is a "special circumstances" defence available if the employer can show that it was not reasonably practicable for them to comply, and that they took such steps as were reasonably necessary.

## Pensions

Pension rights under "occupational pension schemes" are excluded from TUPE (although Group Personal Pension Plans are not). Accrued pension rights have to be protected. There is limited protection for future service pension rights set out in the Pensions Act 2004. Benefits which are not "old age, invalidity or survivors" benefits transfer - for instance, enhanced redundancy rights involving early payment of pension entitlement.

Further protection is provided in the public sector by "The Fair Deal for Staff Pensions".

## Pre-transfer redundancy consultation

TULRCA was also amended in January 2014 with the result that the new employer can begin consulting with appropriate representatives of the outgoing employer's workforce before the transfer takes place in relation to collective redundancies to take effect after the transfer. The agreement of the outgoing employer is required. The incoming employer is treated as the employer for the purpose of the consultation.

## Conclusions

**With the prevalence of privatisation and outsourcing, and the frequent commercial desire to cut pay and terms and conditions, TUPE has long been one of the most bitterly contested areas of employment law.**

In the 2013 consultation, the government had wanted to abolish SPCs and make it possible for employers to harmonise terms and conditions. Both these initiatives were thwarted. But there are ongoing encroachments even into these fundamental areas. The scrutiny of the requirements for there to be an SPC is intensifying, detracting from their original purpose of providing a pragmatic solution in cases of outsourcing.

The 2014 changes have created a two-tier hierarchy of contractual rights, with terms derived from collective agreements being given less protection.

Whether various aspects of TUPE comply with the Acquired Rights Directive – in the areas of changes to terms and conditions, dismissals by reason of the transfer and information and consultation rights – is questionable. Likewise, it is not at all clear that the pre-transfer collective redundancy consultation rules comply with the Collective Redundancies Directive.

Particularly disturbing has been the recent pronouncement from the Court of Justice of the European Union that the purpose of the Directive is to “balance” the interests of employers and employees. Thompsons emphatically rejects that interpretation – the purpose of TUPE (and the Directive) is and always has been, the protection of employees' accrued rights in the event of a transfer of the undertaking in which they work.

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Published November 2014

TH14-038

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