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## **Article**

### **Title: TUPE unravelled. How much do you really know about the risks involved in buying or selling a business?**

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Most business (or prospective business) owners are aware of the acronym 'TUPE' – the Transfer of Undertakings (Protection of Employment) Regulations 2006, accompanied usually by much confusion as to how, if, when and in what circumstances these regulations may apply to them in their business dealings.

Although the economic times in which we find ourselves are extraordinary, businesses continue to be acquired and sold as before and many of those that are struggling are being placed under administration or reorganised in an effort to cut costs and save the business. But what happens to employees when a business undertaking is transferred? When buyers and sellers are caught up in the challenges and tight deadlines involved in negotiating the terms of a business acquisition, it is surprising how often this question is overlooked.

#### **When will TUPE apply?**

The TUPE Regulations can apply to the transfer of an undertaking of any size, regardless of whether the undertaking has one employee or one thousand employees.

The TUPE Regulations apply to the transfer of undertakings in specific circumstances. This kind of transfer most commonly occurs either:

- as a 'business transfer' – when the whole or part of a business is sold and transfers from one employer to another as a going concern, or
- when a business engages a contractor (for example a cleaning company), to do work on its behalf, or reassigns that contract or brings the work back 'in-house' (known as a 'service provision change').

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### **What happens to the employees on the sale of a business?**

The main effect of the TUPE Regulations is to preserve the employment and terms and conditions of those employees who move from the old employer (the seller) to the new employer (the buyer) on the date of the sale. This means that all the employees of the seller **automatically** become employees of the buyer on the **same** terms and conditions of employment. The transfer happens as a matter of law. It is not a choice or a matter for negotiation for either the buyer or seller and the buyer cannot pick and choose which employees it wishes to keep. The dismissal of an employee either before or after the sale of the business for a reason connected to the sale of the business is automatically unfair.

There are circumstances in which it may be fair to dismiss an employee for a reason connected to the sale but these can be difficult for the employer to prove. The buyer assumes the biggest risk under the TUPE Regulations, as it is the buyer who is held responsible for any unfair dismissal claim brought by a former employee. However, it is common and certainly in the best interests of a buyer in a sale, to secure an indemnity from the seller to cover any costs which may be incurred in respect of employee claims which may result from the transfer. This means the liability and costs of getting it wrong could come back to the seller for some time after the sale.

### **What must be done before the transfer?**

Employees who will be affected by the transfer have a right to be informed and consulted about the transfer. There is no minimum time period for consultations but they should take place in good time before the transfer takes place. The seller and the buyer should try to cooperate as far as practically possible in communicating the news to those employees who are affected. In reality, this can be very difficult, particularly when both parties are eager to conclude a deal as swiftly as possible.

Commercial confidentiality is an important consideration for the buyer and seller during negotiations and it may be necessary for a deal to be kept confidential up to the moment when contracts are exchanged. But the general view is that there is nothing stopping a seller and buyer from providing a reasonable period of time between exchange and completion to allow the information and consultation processes to run their course, and this will probably fail as a defence to 'failure to consult'.

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Under the TUPE Regulations the seller is obliged to provide the buyer with information about the transferring employees. This is called employee liability information and includes the name, age, terms and conditions and any disciplinary, grievance or legal proceedings relating to each employee.

### **What happens if we get it wrong?**

An employee who has been dismissed for a reason connected to the sale may bring a claim against the buyer for automatic unfair dismissal and may be awarded compensation for all lost earnings and benefits resulting from the unfair dismissal. These sums can be significant. The current maximum tribunal award for unfair dismissal is £66,200.

Both dismissed and transferred employees may bring a tribunal claim for failure to consult against both the seller and buyer for up to 13 weeks pay.

A seller that does not provide the required employee liability information to a buyer can be held liable for fines of up to £500 per employee.

### **How do we get it right?**

Whether you are a buyer or a seller, if a sale or transfer of a business (or part of a business) or a service provision change is contemplated, think about your obligations to employees at these early stages and contact the Phillips' Employment Team to talk about the planned transaction. We can help you decide whether the TUPE regulations apply to the transaction in question and if, as in most cases they do, then we can provide you with advice and guidance on what to do next. Whether you are a buyer or a seller, we can work together with you to manage the process efficiently and in good time and most importantly avoid what could be the very costly effects of getting it wrong. [www.phillips-law.co.uk](http://www.phillips-law.co.uk)

ENDS

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