

# TUPE

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TUPE: Refresher and Update

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March 2012

# What we are going to look at

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- > TUPE Overview: A refresher on core elements
- > Issues highlighted in recent cases
  - > Is there a transfer?
    - > Issues on outsourcing
  - > Issues on transfer
    - > Information and Consultation
    - > Dismissals
  - > Post-transfer issues
    - > Harmonisation of terms and conditions
    - > Union recognition and collective agreements
    - > Distressed Businesses
- > What Next? BIS Call for Evidence on effectiveness of TUPE

## TUPE Overview

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Legislation implementing the Acquired Rights Directive in the UK which preserves the employment and protects the rights of employees on a transfer of a business or service provision change

# TUPE Overview

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## When does TUPE apply?

Share Sale



Transfer of a business



- > organised grouping of resources
- > economic activity
- > business in the UK before transfer



Service Provision change



- > organised grouping of resources
- > supply of goods
- > single specific event or task of short-term duration



Restructuring/reorganisation



## TUPE Overview

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Who transfers?

All employees assigned to the **organised grouping of resources** subject to the relevant transfer

Assigned?

- > Employees
- > Terms of employment
- > How much time spent on transferring business/provision of services to a particular client?
- > Employees' right to object

# TUPE Overview

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## TUPE Protection for Employees

### Automatic transfer of employment

- On current terms and conditions
- Service continuity preserved
- Exceptions for certain pension entitlements
- Right to object

### Preservation of terms and conditions

- Post-transfer changes void if in connection with a transfer
- Makes no difference if changes are favourable
- Limited exception if for an ETO reason
- No time limit
- Limited changes permitted where transferor insolvent

### Employee Protection

- Dismissals connected with transfer automatically unfair
- Unless dismissal is for an Economic, Technical or Organisational (ETO) reason entailing changes in the workforce
- Rights where a substantial change in working conditions to material detriment of employee

# TUPE Overview

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## Information and consultation obligations

- > Transferor and Transferee both have obligations
- > “Long enough before a relevant transfer... to enable consultation”
- > No specific duration
- > Information:
  - > fact of transfer, date and reasons
  - > legal, economic and social implications
  - > measures
  - > agency workers
- > Information and consultation with Employee Representatives
- > The obligation to consult v consultation in practice
- > Penalties for failure to inform and consult



## TUPE Overview

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### **Employee liability information**

- > Statutory minimum information which must be made available 14 days before transfer
- > Includes:
  - > terms and conditions of employment
  - > disciplinary and grievance
- > Failure to deliver results in liability of £500 per employee minimum
- > Usually supplemented/replaced by due diligence



## Recent Cases

Pre-transfer dismissal automatically unfair even though no transferee identified  
*Spaceright Europe Limited v Mr Bruno Baillavoine*

Dismissal of employees who were replaced by franchisees was an ETO reason (*Meter U Ltd v Hardy & Others*)

- STOP. Key/New Points

Fragmentation of a service – TUPE did not apply on service provision change (*Enterprise Management Services Ltd v Connect-UP*)

Harmonisation of terms and conditions post-transfer (*Smith and Others v Trustees of Brooklands College and Enterprise Managed Services Ltd v Mr SC Dance and Others*)

Is there an 'organised grouping of resources'? (*Eddie Stobart Ltd v Mr J Moreman & Others*)

Basic award where transferor in administration (*Pressure Coolers Ltd v Molloy and Others*)

- THINK. Issues to consider

No exceptions to TUPE where transferor is in administration (*Key 2 Law (Surrey) LLP v Gaynor De Antiquis*)

No post transfer recognition of changes to collective agreements required (*Parkwood Leisure Ltd v Alemo-Herron and Others*)

- PROCEED WITH CAUTION

## Is there a transfer? Issues on outsourcing

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TUPE applies:

- > to outsourcing/insourcing/second generation outsourcing
- > where an 'organised grouping of resources'
- > not a single specific task of short-term duration
- > not wholly or mainly the supply of goods

## Is there a transfer? Issues on outsourcing

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### Enterprise Management Services Ltd v Connect-Up

- Contract between Enterprise and Leeds City Council for IT services to schools
- Re-tendered contract with Connect-Up excluded some service cover (representing 15% of work under old contract)
- Under the new contract, significant number of schools chose other providers
- Change in activities and fragmentation of services meant that TUPE did not apply

## Is there a transfer? Issues on outsourcing

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### Pannu & Others v Geo W King

- Claimants employed by GWK on an assembly line producing van parts
- Parts supplied to IBC
- Components supplied to GWK by a third party and funded by client IBC
- Claimants dismissed following GWK's liquidation
- GWK's activities were the supply of goods not services so no TUPE transfer

Where goods are supplied, is there a distinct service? Question of fact for the Tribunal.

## Is there a transfer? Issues on Outsourcing

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### Eddie Stobart Ltd v Mr J Moreman & Others

- Eddie Stobart provided warehousing and distribution services to two clients
- Timing of incoming work meant day-shift employees worked mainly on contract for Vion
- Contract transferred to FJG and day-shift employees claimed they transferred
- There was no organised grouping of employees
- It was not sufficient that a group of employees worked mainly for a particular client

## Issues on transfer

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### **Information and Consultation – practical points**

- > Transferor and Transferee both have obligations
- > Timing: when should information be given/consultation happen?
- > Consultation on measures
- > Redundancies and TUPE – whose liability?

## Issues on transfer – Information and Consultation

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### Transferor

- Provide prescribed information about the transfer to its own affected employees through employee representatives
- Consult with its own affected employees through employee representatives about measures the **transferor** proposes to take in relation to them

### Transferee

- Provide information on measures to transferor including any proposed redundancies
- Consult with its own affected employees through employee representatives about measures the **transferee** proposes to take in relation to them

In practice, transferee will usually be involved in consultation with transferor's affected employees.

## Issues on transfer

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### Timing

When should information be given/consultation happen?

“Long enough before a relevant transfer... to enable consultation”



- > No specific duration
- > Is there union representation?
- > Are employee representatives already elected?
- > How much cooperation is there between transferor/transferee?
- > What impact on employees is anticipated?
- > Is transfer sensitive/confidential?

Timing will vary according to the nature of the transfer.



## Issues on transfer

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### Consultation on measures:

- > Changes that will impact affected employees

- > Proposed redundancies



- > Change of location



- > Change to pay date



- > Changes to bonus schemes/entitlements



- > Change to reporting lines/job functions



- > Fact of the transfer itself



- > Reasons for the transfer



## Issues on transfer

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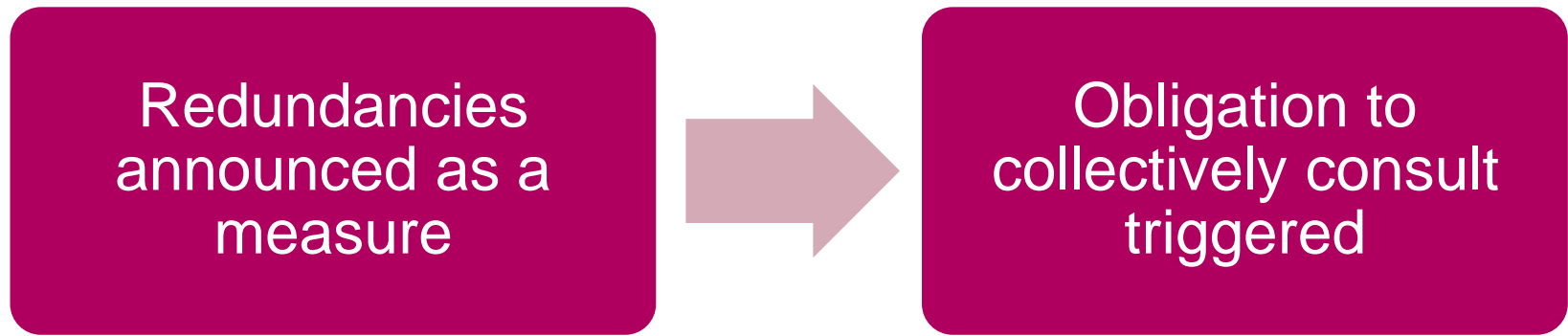
### **Dismissals**

- > Automatically unfair if reason is transfer or 'in connection with a transfer'
- > Unless for an economic, technical or organisational reason entailing changes in the workforce
- > Pre or post-transfer dismissal?
- > Transferee liable for pre-transfer dismissals by reason of or connected to the transfer

## Issues on transfer

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### Redundancy and TUPE



- > Can transferee consult with affected employees of the transferor?
- > Can transferee rely on transferor's pre-transfer consultation?
- > Can transferor rely on transferee's reason?
- > Relocation alone is not an ETO reason for redundancy dismissal

## Issues on transfer

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### **Checklist for redundancy liability**

- > Are redundancies proposed?
- > Are the redundancies by reason of or in connection with the transfer?
- > Will the transferor or the transferee make the redundancies?
- > Can the transferee or the transferor rely on an ETO reason?
- > Who will be liable for the redundancies under TUPE?
- > Can liability be apportioned between the parties?

## Issues on transfer

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### Meter U Ltd v Hardy & Others

- Claimants worked for two different meter-reading companies
- A new contract was granted to Meter U and the employees' employment transferred
- Meter U does not employ meter readers but provides its service through a number of Franchisee Companies that are typically owned by individual meter readers
- The transferred employees were dismissed
- The dismissals were for an ETO reason
- The replacement of the employees by franchisees did entail changes in the workforce

## Issues on transfer

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Spaceright  
Europe  
Limited v  
Mr Bruno  
Baillavoine

- Ultralon was put into administration and the Chief Executive was dismissed on the same day
- No transferee had been identified
- About a month later the Ultralon business was sold as a going concern
- TUPE transfer
- Dismissal of the Executive was in connection with the transfer to make the business more attractive to a purchaser
- There was no ETO reason for the dismissal so automatically unfair

# Post-transfer Issues

## Harmonisation of terms and conditions post-transfer

### Existing Position

- Changes in **connection with a transfer** void
- ETO exception limited and rarely used
- No time limit

### Recent Cases

- Post-transfer changes were found not to be in connection with a transfer
- Is it harmonisation or 'correction' of out-of-step terms/increasing productivity and efficiency
- *Smith and Others v Trustees of Brooklands College*
- *Enterprise Managed Services Ltd v Mr SC Dance and Others*

# Post-transfer Issues

## Union Recognition and Collective Agreements

### Existing Position

- Deemed recognition if transferred organised grouping of resources/employees maintains an **identity distinct from** the remainder of the transferee's undertaking
- Transferee not bound by post-transfer changes to transferor's collective agreements ("**static**" approach)

### Recent Cases

- *Parkwood Leisure Ltd v Alemo-Herron and Others*
- Existing position has not changed
- Reference to the ECJ to establish whether ARD allows National Courts to give effect to post-transfer changes to collective agreements ("**dynamic**" approach)
- If the ECT rules that "dynamic" approach permitted – significant impact on transferees



# TUPE: Distressed Businesses

## Special Provisions

Transferor subject to Relevant Insolvency Proceedings NOT with a view to the liquidation of the assets of the transferor

Transferor subject to bankruptcy or any analogous proceedings with a view to liquidation of the assets of the transferor

Liability for certain pre-existing employee debts paid by Secretary of State (arrears of wages/holidays taken)

Limited variations to contracts permitted

No automatic transfer of contracts of employment

Loss of special protection against dismissal

## TUPE: Distressed Businesses

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### Key 2 Law (Surrey) LLP v Gaynor De Antiquis

- Court of Appeal
- Administration can never be 'with a view to liquidation of the assets of the transferor'
- Employees still transfer under TUPE where transferor is in administration
- Accords with established market practice
- Removes legal uncertainty

## TUPE: Distressed Businesses

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### Pressure Coolers Ltd v Molloy and Others

- Transfer of a business from Maestro to Pressure Coolers by way of a pre-pack administration
- Employee dismissed after the transfer
- Employee successfully claimed holiday pay and unpaid wages owed to him before transfer from Secretary of State
- Claim for basic award not payable by the Secretary of State because dismissal was after the transfer

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- PROCEED WITH CAUTION

## BIS Call for Evidence on the Effectiveness of TUPE

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### **What Next?**

- > Simplification within constraints of ARD
- > Remove service provision changes from the TUPE regulations?
- > Increased flexibility to harmonise terms and conditions post-transfer?
- > Clarity and transparency as to whether TUPE applies, rights and obligations?
- > Overlap with other legislation including collective redundancy consultation

## Questions?

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