



The HR Edit

Series 1, Episode 3: TUPE in a nutshell

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Helen:

Hello and welcome to the HR Edit. South East Employers brand new podcast taking a look at those common and often tricky HR questions.

The podcast is free to listen to, you can find it on Apple Podcast or wherever you get your podcast and on our website at www.seemp.co.uk/thr-edit, which is also where members will find any related resources mentioned in our episodes.

This podcast is not just at HR experts, but it can be a useful refresher. We have created it with managers in mind as well to help them navigate through some of the complexities of people management and reduce some of the potential pitfalls.

With me today we have our favourite HR expert, an employment and people insight manager at SE Michelle. Hi Michelle.

Michelle:

Hiya.

Helen:

And SEE's business development manager Sarah. Hiya Sarah.

Sarah:

Hello.

Helen:

So today Michelle, you're going to be giving us a very light overview of TUPE.

Michelle:

Yes, 15 to 20 minutes on TUPE is a bit of a challenge for me. I normally spend a whole day doing this.

Sarah:

Yes, I think this is going to be an interesting one, a bit of a TUPE in a nutshell I think.

Helen:

Yeah, definitely. Mini introduction shall we say. So ,should we jump right in?

Michelle:

Absolutely.



Helen:

So, Michelle, what does 2P stand for and what is it?

Michelle:

So TUPE stands for the Transfer of Undertakings, Protection of Employment, and the regulations were put in place essentially to protect an employee when their employer changes without their control.

The law doesn't like employees having two masters or employers, and they recognise that the power imbalance sits on the employer's side rather than the individual employee. So they're very keen to see that the employee is protected and that doesn't just apply to TUPE, but we're talking about that today.

This means that when a transfer does take place, the employee will be protected, and they will retain as far as reasonably possible, all their contractual entitlements. And the contractual employment will effectively read as if their new employer has always been their employer.

Sarah:

So are we right in thinking that Michelle, it essentially protects the employee and maintains their sort of benefits like their holiday entitlement, that kind of thing?

Michelle:

Absolutely.

Anything that's in their contract will be protected. There are some circumstances, and we'll cover them a bit later, where it's not possible to protect every contractual entitlement and there are things that the new employer can do.

The TUPE regulations cover two types of transfer. The first is a business transfer and this is generally where a business is sold to another organisation. The other type of transfer is a service provision change and this is where the provision of a service moves from one organisation to another.

In local government, we tend not to see the business transfer side of things. We tend to see the service provision changes most often, and that's what I will focus on today.

Sarah:

Fab. So, leading on from that then Michelle, what is the service provision change?

Michelle:

So, service provision change happens when a service is transferred out, so outsourcing, transferred back in house, so insourcing, or where a contract for service provision is retendered and relet.



In local government, if we are transferring a service out to another authority or moving a service provision between authorities, this technically isn't covered by the TUPE regulations, but we have some gold plating guidance in place that means that realistically we treat those transfers as if TUPE applies.

Sarah:

It sounds like there's lots of grey areas, Michelle, and it really is a case-by-case basis then.

Michelle:

Yes, there are lots of grey areas. It's an incredibly complex area of employment law and to cover it off in a short podcast is really, really challenging. Today I'm going to focus very much on the pitfalls and those areas where we get most questions.

Sarah:

Perfect.

Helen:

So Michelle, what is the first challenge an organisation might face when they're undertaking a transfer?

Michelle:

To be honest, the first thing that an organisation will face is actually considering what will transfer. And in fact, it's not actually the people that you need to consider first.

And I know that sounds really, really counterintuitive for an HR function. But the focus actually has to be on the work that is to be transferred. Only by understanding that will you then be able to identify the people that will go with the work.

Sarah:

That does make a complete sense. So you have to understand what work there is to then understand the roles required and the people needed.

Michelle:

Absolutely.

And then in most cases, you will have a really good understanding of what service is going to be transferred within your organisation. And therefore what work will be transferring.

Once the status, provision, requirements or specification have been set out for that transfer, you will then in turn look to the people in those posts.

In the past, we've quite often based who will transfer on the percentage of the work time that they spend on the work that is going to be transferring. But case law has actually changed the way we look at this. They've made it very, very clear that the basis for identifying the people that will transfer is actually the basis of conscious assignment. And this means that a person must have been employed specifically or appointed specifically to undertake the work that will be transferring.



To illustrate that, consider a package delivery service. A company has different contracts with a number of different organisations and a number of employees who are delivering those packages. In the first instance, the delivery people simply pick up the next package to be delivered and will deliver it to whichever company has requested the delivery. In those circumstances, the individuals are not consciously assigned to a particular contract.

Let's say company A decides to move its delivery service from our company to company B. Because none of the employees are consciously assigned to deliver for company A, none of them will transfer to the other delivery company.

On the counter side to that, if we had employed delivery person one, specifically to service company A, they happen to pick up the odd parcel for other companies as they have downtime from delivering for company A, and they will deliver for any of the other companies that contract with us. If A decides to change delivery companies, because employee one has consciously been assigned, they've specifically recruited and assigned to company A, regardless of how much of their actual work time is spent delivering for company A, they will transfer with that work. Oh, wow. That sounds really complicated, Michelle, but you did a great job explaining that.

Sarah:

Moving swiftly on, what happens if the employees don't want to transfer?

Michelle:

So, this depends on the reason why the employee doesn't want to transfer. If they don't want to work for the incoming company, say they've previously worked for them and didn't like it, or were mistreated for whatever reason, the employee can object to the transfer, but this is essentially them resigning from their job, because their current employer won't have any work for them to do once the service provision transfers across.

As the current employer, you should ensure to the best of your ability that the employee understands the implications of their objection, i.e. they are resigning, and that they have confirmed their objection in writing, because what you don't want is for them to kind of go, "Oh, I didn't understand that I would be out of a job, I thought I would stay with you." So you need that evidence.

The other situation where an employee might object is where the incoming employer cannot provide all the existing contractual terms and benefits, and the measures that they offer to mitigate those differences are considered by the employee to result in a material financial detriment. In those circumstances, they view themselves as being less well off under the new employer, and they can object because the role being offered to them by the new employer is deemed to be not suitable alternative employment. And in those circumstances, effectively, the employee is being made redundant through the TUPE process.

Sarah:

Right, and with that kind of redundancy through the TUPE process, then, is a redundancy payment due?

Michelle:

Yes, it would be due.

And invariably, what happens is there is an agreement between the current employer and the new employer as to who will fund that redundancy payment.

Sarah:

Right.

Helen:

So I assume you have to communicate a transfer to the affected employees?

Michelle:

Absolutely. When an organisation plans to transfer a service provision, they are required to consult with all affected employees about the business needs and the plans for transferring the service.

Helen:

And then, are there any risks to this?

Michelle:

Yes, there are quite a few. Many organisations focus their consultation on the employees that will be transferring, but the regulations specify that an employer is required to consult with all affected employees. This would include those who have a direct working relationship in the current employer and also employees in the new employer where the service will be transferring into.

There's also a risk of incomplete or erroneous information being provided as part of the consultation process. Both current and incoming employers are required to be honest and transparent during the consultation process. Genuine mistakes do occur and the courts will take that into consideration in any ruling that they are asked to make.

For example, if there's a genuine belief that there will be no changes to pay day arrangements, but subsequently the new employer discovers that they are unable to run multiple pay days through their payroll system, that in itself is unlikely to result in a significant award being made.

Helen:

Right. So what comes next in the 2P process? What is the next challenge?

Michelle:

So the next challenge is understanding what rights and liabilities will transfer to the new provider. Essentially here, the law says that on transfer, all contracts of employment will be read as if the new employer has always been the employer. This means that all contractual rights, obligations, liabilities and risks transfer to the new employer.



So if the current employer has an equal pay risk, the new employer will effectively be taking responsibility for that wrongdoing. This is why when we talk about 2P, we will often talk about due diligence processes, warranties and indemnities.

Sarah:

What do you mean by due diligence in this context, Michelle?

Michelle:

So due diligence is the process of the new employer undertaking a significant evidence gathering to understand the obligations, risks and liabilities that they are about to accept. The current employer must provide details of all the transferring employees, their contractual rights along with details about any live or potential casework that may arise. This includes disciplinary grievance, capability and sickness absent cases, especially where they may lead to a dismissal.

Where risks are identified, the new employer may ask for warranties or indemnities so that they avoid any financial implications. So from this you can see that the quality of paperwork and documentation will either help or hinder with your due diligence. Good quality and accurate documentation makes identifying any and all contractual obligations and risks really easy.

However, even when all the documentation is in order, this is not a quick process. So making sure that you have sufficient time to thoroughly review all the relevant documentation is critical to getting your due diligence right. That's not to say that there haven't been cases where a council has had less than a week to bring a service in house following the collapse of a supplier.

These cases, thankfully are rare, but they are incredibly high risk for the incoming employer. And more often than not, you won't get any warranties or indemnities because the collapsed employer isn't able to provide them because they don't exist.

Sarah:

Oh, that sounds like an absolute nightmare.

Michelle:

It is and the cases that I have come across don't go well!

Sarah:

No, you can imagine!

Crikey. Okay, so moving on then, can you change and employ these terms and conditions through this sort of cheapy process?

Michelle:

Generally speaking, a contractual right will transfer with the employee and cannot be changed. There are some exceptions to this. The first is when in advance of the transfer, the



new employer identifies that it is unable to offer contractual entitlement or benefit. In these circumstances, part of the consultation phase must include details of any measures that the new employer will have to take. This could be changing the pay date, the frequency of pay dates from weekly to monthly, provision of pension schemes or the provision of something like private medical insurance.

The new employer will have to state what changes they will be making and how they will support employees through that transition. Where the new employer is not able to provide an alternative comparable benefit, normally they would be required to compensate the employee for this loss. These measures can give rise to potential claims from the transferring employees. Where there's quite a substantial difference caused by the measures, the new employer is planning to put in place, the employee may object to the transfer on the grounds of substantial financial detriment as we've discussed already.

The other situation that you may make changes to terms and conditions in is where the employer has an economic, technical or organizational reason or ETO reason that entails a change in the workforce. This could be the ongoing financial viability of the organisation, the introduction of a completely new production system or the real organization or restructuring team.

The key is to remember, any reason must mean that there is a change in the workforce, such as a reduction in the number of employees required, or a change in the workplace location that is sufficient to mean but it is no longer suitable for the existing workforce.

We quite often get asked whether an increase in numbers is deemed to be a change in the workforce and this is a very great area and it will depend very much on the individual circumstances. We often get asked whether two to three years after the transfer date an employer can harmonise terms and conditions of the transferred employees to their own local terms and conditions, especially to help defend an equal pay claim.

In the world of TUPE harmonisation is an incredibly bad word. Harmonisation is not an economic, technical or organizational reason for change and it won't result in a change in the workforce. Therefore, if the only reason you are seeking to change the terms and conditions is to harmonise them, those changes would be deemed to be in connection with the transfer and therefore, unlawful and there's no time limit on that. This is the case even if some of the changes are beneficial, such as a higher pay or annual leave entitlement, but sick pay is less. What happens is the employee becomes entitled to cherry pick the best terms from their original contract and from the new terms that you have offered, effectively inflating your costs and their entitlements.

To be honest though, in today's climate, it's unlikely that an organisation won't have an ETO reason to change the terms and conditions within the first five years of the transfer. Ultimately, there are ways to change those terms and conditions as long as you have that ETO reason.

Sarah:



That's probably where you as our expert come in Michelle, I imagine. I imagine a lot of the TUPE questions and queries you get are relating to that kind of thing and certainly the help that you give councils relates to that as well.

Michelle:

As I said, this is an incredibly complex area of employment law and you really do need to understand the individual circumstances of a transfer to be able to provide robust advice.

Sarah:

Yeah. And if somebody's after that advice in the Southeast region, Michelle, how can they get hold of you?

Michelle:

As I said at the beginning, 15 to 20 minutes on TUPE is a real challenge and there are some key areas that I just haven't had time to cover today. So, if you are a member of Southeast employers and need advice on a particular TUPE case that you are dealing with, please do get in touch and I will do my best to help.

Helen:

Thank you, Michelle, for that quick look at the complicated world of TUPE and if you would like to get in touch with Michelle and you are a member of SEE, please email advice@seemp.co.uk and we have a whole host of information, resources and various details about the services SCE offers available on our website at www.seemp.co.uk.

Thank you for joining us. As I said, the HR edit will be available on the SCE website at www.seemp.co.uk/thehredit, on Apple Podcast or wherever you get your podcast and we hope to have you back for our next episode.

Thank you very much and we'll see you then.

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