

TUPE



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Expected outcome from this Knowledge Insight Guide

The objective of this Knowledge Insight is to give guidance, predominantly to CIPS members or other procurement professionals, as to how the new Transfer of Undertakings (Protection of Employment) Regulations ('The Regulations') will affect all those responsible for outsourcing services that were previously carried out in-house, or preparing for a subsequent tendering procedure following a prior outsourcing (often referred to as the 'second tendering round').

Executive Summary

Prior to the TUPE (Transfer of Undertakings (Protection of Employment)) regulations, employee contracts were deemed terminated when a business was transferred. It was the choice of the new employer whether to reemploy any of the employees. TUPE regulations are designed to protect the rights of employees in a transfer situation enabling them to enjoy the same terms and conditions, with continuity of employment as before. The main EC Directives are:

- The Acquired Rights Directive (77/187/EC)
- The Acquired Rights Directive (98/50/EC)
- The Acquired Rights Amendment Directive (2001/23/EC)

TUPE's principal objective is ensuring job security for those employed in a business which is taken over by another business and ensuring also that their new employment is on terms at least the equal of those which they had before the business was transferred. TUPE requires that, where an undertaking is transferred from one employer to another, the following (with the exception of pension rights) are taken over by the new employer:

- the contracts of employment
- the rights and obligations arising from these contracts
- the rights and obligations arising from the relationship between the transferor and the employees working in that undertaking any existing collective agreements.

Employees who are employed by the original employer at the time of transfer automatically become employees of the new employer, as if their contracts of employment were originally made with the new employer; service is counted as continuous from the date on which employment commenced with the first employer.

Transfers where these Regulations apply include:

- where the whole or part of a sole trader's business, or a partnership, is sold as a going concern
- where two companies cease to exist and combine to form a third
- where a company, or part of its business, is bought by another, provided this is done by the second company purchasing the assets and the business (and not just the shares) of the company being transferred.

In the translation of the Acquired Rights Directives into UK law, a number of anomalies arose and there have been various amendments to the Regulations and a great deal of case law.

The most recent overhaul has been subject to prolonged consultation and the new TUPE 2006 regulations came into force on 6th April 2006.

Main Changes

The regulations have been amended with a view to clarifying and reducing the number of 'grey areas' that became subject to case law.

The main changes are detailed below:

- more comprehensive application of the regulations to service provision situations where services are outsourced, insourced or assigned to a new contractor. This gives clarity that the regulations apply to more labour intensive activities such as office cleaning, catering and so on;
- the transferee must be made aware of the employees' rights, obligations and liabilities on point of transfer;
- clarification of the circumstances where ETO (Economic, Technical or Organisational) defence can be applied to change the terms and conditions of employment and in which employers can lawfully make transfer-related dismissals
- transfers of insolvent businesses are more viable by introducing greater flexibility to attract buyers;
- joint liability of transferor and transferee to inform and consult appropriately with the transferring employees;
- territorial application of TUPE is extended such that overseas employees may also be caught by the transfer.

Service Provision Changes

A service provision change is defined to include any contracting out scenario, whether first stage contracting out (when a client first outsources), second stage contracting out (where a client retenders and a new contractor appointed) and the taking back in-house of previously outsourced services. This is the most significant provision within New TUPE (especially with respect to the procurement profession), and is designed to bring to an end current disputes between contractors as to whether or not TUPE applies, particularly on second stage contracting out. This is shown pictorially below.

Obligations of the Transferor

The transferring organisation is obliged to detail all employees affected by the transfer and to provide this information to the receiving employer. The information must be provided in writing and must include the identity and age of the employees that will transfer, information provided in the employees' written particulars of employment and details of any claims that the transferor reasonably believes might be brought. If the transferor fails to provide such information then the transferee may apply to a tribunal for compensation which starts at a minimum of £500 per employee where information was incomplete or proven to be incorrect.

Clarification on TUPE Related Dismissals

The regulations have been amended to give greater clarity on when dismissals related to a TUPE transfer are considered legal or when changes can be made to the transferring employees' terms and conditions.

Dismissals or changes to terms and conditions solely as a result of the transfer are automatically deemed unfair. Dismissals or changes to terms and conditions related to the transfer but caused by Economic, Technical or Organisational reasons may be legal subject to the normal test under the unfair dismissal legislation.

There is no statutory definition of the term Economic, Technical or Organisational reasons, but is likely to include:

- a reason relating to the profitability or market performance of the transferee's business (such as an economic reason)
- a reason relating to the nature of the equipment or production processes which the transferee operates (such as a technical reason)
- a reason relating to the management or organisational structure of the transferee's business (such as an organisational reason)

The courts have interpreted the desire to change the terms and conditions of transferring staff to achieve harmonisation across the workforce solely as a result of the transfer as automatically unfair and illegal.

Transfers of Insolvent Businesses

The regulations have been amended to promote the 'rescue culture' by providing that some employee liabilities will not transfer across and allowing greater freedom to agree variations to terms and conditions where these variations are 'designed to safeguard employment opportunities'.

Consultation with Employees

The regulations require both the transferee and transferor employers to consult representatives of the affected workforce before the relevant transfer occurs.

Affected employees may include:

- those individuals who are to be transferred
- their colleagues in the transferor employer who will not transfer but whose jobs might be affected by the transfer
- their new colleagues in employment with the transferee whose jobs might be affected by the transfer.

The employer must inform the representatives well in advance of any proposed transfer:

- that the transfer is going to take place, approximately when and why
- the legal, economic and social implications of the transfer for the affected employees
- whether the employer envisages taking any action (reorganisation for example) in connection with the transfer which will affect the employees, and if so, what action is envisaged
- whether the prospective new employer envisages carrying out any action which will affect the employees, and if so, what.

Territorial Application

The regulations apply to the transfer of an undertaking situated in the UK immediately before the transfer, and, in the case of a service provision, where there is an organised grouping of employees situated in the UK immediately before the service provision change. The regulations are still deemed to apply even if a large number of employees are based outside of the UK in their day to day roles as long as the undertaking itself (comprising, amongst other things, premises, assets, fixtures and fittings) is situated in the UK.

In the case of service provision change, the test is whether there is an organised group of employees situated in the UK immediately before the service provision change – even if an individual works from a base outside of the UK, TUPE regulations would still apply. If, however, the whole team works from a base outside the UK, TUPE regulations would not apply, as there would be no organised grouping of employees situated in the United Kingdom.

Pensions

Strictly speaking, obligations relating to provisions about benefits for old age, invalidity or survivors in employees' occupational pension schemes do not transfer under TUPE. However, the provisions of the Pensions Act 2004 sections 257 and 258 do apply to transfers taking place after 6th April 2005. In effect, this means that provisions equivalent to the TUPE regulations apply to pension rights from that date. In essence, if the previous employer provided a pensions scheme then the new employer has to provide some form of pension arrangement for employees who were eligible for, or members of, the old employer's scheme.

It will not have to be the same as the arrangement provided by the previous employer but will have to be of a certain minimum standard specified under the Pensions Act.

Service Provision Change – Implications for Procurement and Outsourcing

The most fundamental impact on procurement and the outsourcing process is that it has been made absolutely clear that TUPE regulations apply to service provision changes at the point at which the service is outsourced, in a change of contractor to provide the outsourced service (second stage contracting out) and in the bringing back in-house of a previously outsourced service.

The only time that TUPE regulations will not apply to a service provision change is when the contract is wholly or mainly for the supply of goods for the client's use, the activities are carried out on a one-off or short-term basis, or the current contractor has an operation based overseas or the majority of staff based overseas. Equally, the service provision change must involve an organised group of employees which has as its principal purpose the carrying out of the activities concerned on behalf of the client, such as essentially dedicated to the activity. The majority of outsourcing activity and second stage contracting changes will be covered by the new TUPE regulations.

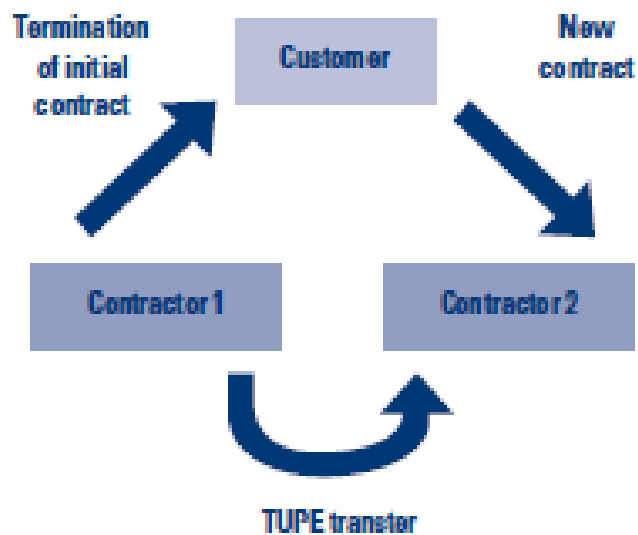
Outsourcing



Bringing back inhouse



Second stage contracting out (after tender exercise)



SWOT Analysis (from a Procurement viewpoint)

Below, is a SWOT analysis, from a procurement perspective, showing the likely impact of the service provision changes within the new TUPE regulations.

Strengths Gives absolute clarity that TUPE applies to service provision changes (no longer grey areas) Allows an open dialogue at an early stage between new and old contractors on liability and transfer of assets – earlier clarification on the financial impact. In the case of a new contractor not being geared up to deliver the service, the transfer of both staff and assets allows this to happen more quickly Less uncertainty and risk of litigation through not following TUPE regulations as clarification has now been given	Weaknesses The financial liability associated with TUPE could be massive and will ultimately increase contractor costs and therefore client costs Financial liability could stop outsourcing or second stage contracting occurring even if the service would benefit from a transfer The transfer of existing staff could be negative if the reason for the proposed change is a perceived poor service TUPE will inevitably delay any service provision change due to the requirement for consultation and will impact on any savings delivery or improved service associated with the change
Opportunities Gives greater consideration to the decision as to whether or not to outsource or change service provider The transfer of existing staff means that there is more likely to be a smooth transition to the new service and reduces the learning curve, hopefully leading to improved service Old and new contractors are obliged to work more closely on TUPE issues which could give the opportunity for closer working in the transfer of the service itself	Threats Contractors could use the TUPE argument to avoid the client re-tendering – may be less focused on delivering excellent service if the threat of change is reduced Still grey areas within the legislation e.g. definition of ETO, whether an organised group of employees is involved in the activity If transferring employees join the new contractor on improved terms compared to the existing staff, this could lead to staff issues. The transferring employees' terms cannot be reduced so the only way of harmonising would be to increase those of existing staff leading to increased costs. The requirement to consult widely could lead to long delays and the potential risk that service will suffer as the existing contractor will have little incentive to maintain it

Implications for Procurement of the Other Changes

The transferring organisation is obliged to provide to the new employer the names of all individuals and their liabilities prior to the transfer taking place. This is particularly pertinent to second stage contracting out (after a retendering exercise). This will allow the new contractor to have early visibility of the cost and other implications for his company although not necessarily at the point of submitting his tender prices. If TUPE costs are not available at the time of the tender then the Procurement arm must be aware that the cost of the service is likely to increase and attempt to extract an estimated cost from the existing contractor to factor into any procurement decision.

There remains no actual definition of Economic, Technical or Organisational (ETO) reasons for changing transferring employees' terms and conditions or related dismissals. This leaves a certain ambiguity for the new contractor as to what can and can't be done legally under the TUPE regulations. Whilst the risk of litigation is that of the new contractor, the client is affected by implication and any litigation would embroil the client and the procurement function in a potentially messy legal case.

The requirement for both transferring and receiving employer to consult with all affected employees as defined in the 'Consultation with Employees' section will have the benefit of requiring both parties to work closely together in ensuring due process is followed and will hopefully allow greater dialogue around the mechanics of transferring the business. It is likely, however, to mean a delay to any contract start date as this will need to take place in advance of the transfer and the requirement to consult has been widened to include a greater span of people. This delay could have the benefit of giving the new contractor more time to prepare to take on the new contract, but equally could delay the benefits that will be seen from the outsourcing or service provision change (whether financial or service related). This will impact on the ability of procurement to hit aggressive savings targets. The delay could also have an impact on the service levels as the exiting contractor will have little incentive to maintain them when the business will be going elsewhere.

The extension of the regulations to include service provision changes where some employees are based overseas again increases the areas where TUPE will apply and will have the associated potential benefits and downsides detailed in the SWOT analysis above.

The Pensions Act of 2004, whilst not specific to TUPE, will have implications for the outsourcing process when the new contractor does not currently have an occupational pension scheme in place. The minimum level of pension scheme requires the new employer to match employee contributions up to 6% of salary or to establish an equivalent alternative. This is likely to prove problematic with the existing staff and would maybe result in the scheme being opened up to the entire employee base with the subsequent financial implications. This will ultimately result in increase to the end client if the contractor is unable to offset the cost pressures by other means, eg. business growth; improved efficiency and so on.

Case studies

Staff transfer

The Risk Matrix identifies the range of risks which are borne by staff in the Secondment and TUPE transfer employment models. The transfer of staff effectively means that the Council is transferring a series of risks to their existing staff. TUPE transfers and the Best Value Code of Practice on Workforce Matter do not provide any guarantees. Risks of changes to terms and

conditions of service, changes to staff consultation and representation, and to workplace conditions are transferred to staff. It shows clearly that 100% of the risks for the secondment model are in the none/low risk category compared to only 20% in the transfer model and 16% in the 'choice' model.

The transfer model has 40% of the risk for employees in both the high and medium risk categories. The Council must re-examine its decision to proceed with a TUPE transfer and to more fully examine the advantages of the secondment option."

(1) The Risk Matrix of The European Services Strategy Unit:

[http://www.european-servicesstrategy.org.uk/outsourcing-library/employment-impacts/employment-riskmatrix/Strategic Service Delivery Partnership \(SSDP\)](http://www.european-servicesstrategy.org.uk/outsourcing-library/employment-impacts/employment-riskmatrix/Strategic Service Delivery Partnership (SSDP))

Oldham Council is proposing a £170m - £260m ten-year Strategic Service Delivery Partnership contract which will transfer property, highways, information and communication technology, customer and exchequer services to a Joint Venture Company (JVC) formed with a group of private contractors. The Council proposes to transfer, rather than second, about 350 council staff to the JVC. A potential second phase of the project would include the transfer of human resources, payroll, financial services and administration to the JVC. The project also includes provision of a new Business Centre or customer/call centre in Oldham, potentially part of a wider regeneration project in the town centre.

The Council has claimed this is an incremental strategic partnership but transferring services in two large chunks was not what the government's Strategic Partnership Taskforce had in mind in promoting incremental partnerships, nor is it incremental by any other meaning of the word. The Unity Partnership (Mouchel Parkman, HBS Business Services, Agilisys, Gleeson and Abros) are pressing for all services to be included in Phase 1.

Source: Social & Economic Audit: Oldham Strategic Service Delivery Partnership - Executive Summary.

Summary

The main changes to the TUPE regulations have been to clarify the circumstances in which TUPE will apply. It is now absolutely clear that TUPE does apply to service provision changes at the point of outsourcing, on second stage contracting out (after a tender exercise) and on bringing a previously outsourced service back in-house. The implications for procurement and the outsourcing trend are great and dependent on the specific situation could be seen positively or less positively.

Where a contractor does not have the required staffing levels or assets to perform the contract, TUPE could be the means for achieving this more rapidly with the benefit of having an experienced team. Where the new contractor has sufficient qualified staff and assets to cover the new requirements for the client, then the TUPE obligation will lead to substantially increased costs with potentially little benefit for contractor or client.

Other risks

Where transferring staff are on improved terms and conditions compared with the contractor's existing employees, there is a danger of staff unrest and possible industrial action. Harmonisation down is not an option, as clarified by the new regulations, so the only solution

would be to harmonise everyone to the improved terms potentially at significant cost to the contractor and ultimately the client.

Equally, the application of TUPE and the requirements associated for consultation could result in long delays to the procurement process, leading to reduced in-year savings and potential service issues due to the lack of incentive for the exiting contractor to maintain a good service.

Regardless of whether procurement views these revised regulations positively or not, they are here to stay. The role of procurement is to ensure that it understands fully the implications for outsourcing or second stage contracting and that this knowledge is used to make informed decisions. TUPE implications must be factored into strategy development, project planning, savings projections and exit strategies to ensure the optimum result. The new regulations benefits of greater clarity and earlier notification of liability transfers should make the TUPE situation one that is more readily planned for in procurement decision-making and from that point of view at least, should be welcomed.

TUPE buyer's checklist - Caveats and warnings

The most fundamental impact on procurement and the outsourcing process is that it has been made absolutely clear that TUPE regulations apply to service provision changes at the point at which the service is outsourced, in a change of contractor to provide the outsourced service (second stage contracting out) and in the bringing back in-house of a previously outsourced service.

The transferring organisation is obliged to provide to the new employer the names of all individuals and their liabilities prior to the transfer taking place. This is particularly pertinent to second stage contracting out (after a retendering exercise). This will allow the new contractor to have early visibility of the cost and other implications for his company although not necessarily at the point of submitting his tender prices.

If TUPE costs are not available at the time of the tender then the Procurement arm must be aware that the cost of the service is likely to increase and attempt to extract an estimated cost from the existing contractor to factor into any procurement decision.

There remains no actual definition of Economic, Technical or Organisational (ETO) reasons for changing transferring employees' terms and conditions or related dismissals. This leaves a certain ambiguity for the new contractor as to what can and can't be done legally under the TUPE regulations. Whilst the risk of litigation is that of the new contractor, the client is affected by implication and any litigation would embroil the client and the procurement function in a potentially messy legal case.

The requirement for both transferring and receiving employers to consult will mean a delay to any contract start date as well as other delays including delays to the benefits that will be seen from the outsourcing or service provision change (whether financial or service related) thus impacting on the ability of procurement to hit aggressive savings targets and on the service levels.

The extension of the regulations to include service provision changes where some employees are based overseas again increases the areas where TUPE will apply and will have the associated potential benefits and downsides.

The Pensions Act of 2004, whilst not specific to TUPE, will have implications for the

outsourcing process when the new contractor does not currently have an occupational pension scheme in place.

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