Transfer of Undertakings (Protection of Employment) Regulations 2006

Unite guide for members

A brief guide to the Transfer of Undertakings (Protection of Employment) Regulations 2006

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1. INTRODUCTION

The Transfer of Undertakings (Protection of Employment) Regulations ("TUPE") were first introduced in 1981. After twenty-five years of confusion and litigation, on 6 April 2006, revised TUPE Regulations came into force. The revised Regulations make a number of changes to the original Regulations, some of which incorporate into the revised Regulations elements of important decisions of various Courts and Tribunals.

Please note that this guide is a brief introduction to the Regulations which are a complex piece of legislation. You should contact your full-time official if you need specific guidance or help with how the Regulations apply in specific circumstances.

■ 2. Overview

The basic purpose of the Regulations is to protect workers' jobs when a business is transferred to a new owner. When there is a transfer of a business or undertaking that falls within the scope of the Regulations, the Regulations state that employees of the transferring business or undertaking will transfer automatically to the new business or undertaking, usually on their existing terms and conditions (subject to some exceptions). Collective agreements made on behalf of the transferring employees and in force immediately before the transfer will also usually transfer.

The Regulations also protect affected employees against dismissal: if there are dismissals because of the transfer of the business, such dismissals will, subject to limited exceptions, be automatically unfair. There are also specific duties on the transferor and the transferee to inform and consult with union or employee representatives about the transfer prior to the transfer taking place. The revised Regulations introduce particular provisions that will apply in certain insolvency situations - for example, allowing variations to transferring employees' contracts of employment that would otherwise be prohibited.

■ 3. To what types of transfer situations do the Regulations apply?

The Regulations apply to "relevant transfers". These occur when:

1. one employer transfers the whole or part of a business or undertaking to another employer as a going concern (a business transfer). This includes transfers of undertakings by charitable and "not for profit" bodies and also includes transfers of undertakings from the public sector (either central or local government) to the private sector;

2. there is a "service provision change", i.e. when a client engages a contractor to undertake work on its behalf (out-sourcing), or changes contractor (re-tendering), or brings work that was previously contracted out back in-house (in-sourcing).

a. Business transfers

In order for a business transfer to be a "relevant transfer", there must be a transfer of "an economic entity which retains its identity". An "economic entity" is defined as "an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary." Generally, therefore, there needs to be an identifiable grouping of resources (which could be, for example, employees and assets such as plant and machinery) which is assigned to the business being transferred. By contrast, where there is a transfer of part of the business and employees or other resources are used across several parts of the business and not specifically assigned to one part, there is less likely to be a "relevant transfer."

It is often quite difficult in practice to identify whether there is an "economic entity which retains its identity". Relevant factors to consider will be whether or not the business' assets such as buildings, machinery, tools and goodwill have been transferred – if they have, there is more likely to have been a "relevant transfer". In addition, if the undertaking has been transferred as a going concern and the activities that are being undertaken after the transfer are similar to those undertaken before the transfer, it is more likely to constitute a "relevant transfer". Other relevant factors include whether or not the majority of the employees transfer to the new employer (although the employees cannot simply be dismissed to avoid the application of the Regulations) and the degree of similarity between the customers of the old employer and those of the new employer (the higher the degree, the more likely that there will have been a "relevant transfer").

b. Service provision change

The introduction of the service provision change provisions is one of the most significant changes to the Regulations. In the past, when a contract for the provision of services has changed hands, members have often been caught in a dispute between their old employer, who argued that TUPE applied, and the new service provider, who argued that TUPE did not apply. This was most unsatisfactory: members could be left without a job and having to bring an Employment Tribunal claim to get even a statutory redundancy payment. The service provision change provisions should make such disputes far less common and increase the likelihood of incoming contractors accepting that the old contractor's employees transfer to it.

In order for a service provision change to be a "relevant transfer", the service provision in question needs to involve "an organised grouping of employees…which has as its principal purpose the carrying out of activities concerned on behalf of the client." This means that there needs to be a team of employees dedicated to undertaking the service activities which will transfer, although they do not need to work just on those activities. Therefore, if there is no identifiable grouping of employees, there will not be a "relevant transfer".

A "grouping of employees" can be just one individual. However, there is an exclusion in situations where a client is buying services from a contractor on a "one-off" (rather than ongoing) basis for a short-term task. There is also an exclusion where the activities mainly or wholly comprise the supply of goods to the client – for example when a manufacturer changes the supplier of some of its components. In these situations, there is unlikely to be a "relevant transfer" and the Regulations will probably not apply.

c. Transfers within public administration

The Regulations do not classify transfers of administrative functions between public administrative authorities (for example from central to local government) as "relevant transfers". However such transfers may be covered by other legislation. In addition, protection may be provided by the Cabinet Office's statement of practice "Staff Transfers in the Public Sector" and by the Office of the Deputy Prime Minister's "Code of Practice on Workforce Matters in Local Authority Service Contracts".

Guidance for workplace representatives

Examples of situations where there would be a "relevant transfer"

- Where a business or part of it with a dedicated set of resources is bought or acquired by another (but not via a share sale – see below)
- Where two companies combine to form a third and the two individual companies cease to exist
- Where all or part of a sole trader's business or partnership is sold or otherwise transferred
- Where there is a dedicated team of employees working on a contract to provide services and that contract is re-tendered or brought in-house
- Privatisation situations
- Out-sourcing by local authorities of ancillary services (eg refuse collection) to the private sector
- Out-sourcing of office cleaning, security or catering

Examples of situations where there would not be a "relevant transfer"

- Transfers of assets only (for example, the sale of equipment alone would probably not be covered, whereas the sale of a business as a going concern including the equipment probably would be)
- A one-off, short term contract to provide security services for a specific event such as a concert or a sports event
- Transfers by share sale when there is a sale of shares to new shareholders – in this situation there is no transfer of an undertaking as the same company continues to be the employer; the only change is in the identity of the shareholders

Do the Regulations apply when a UK business or part of it is being out-sourced abroad?

The law in relation to the application of the Regulations to out-sourcing to outside the UK is still unclear, although the case law that does exist suggests that TUPE can apply. You should contact your full-time official for further advice if you are faced with such a situation.

What if the old employer (transferor) and new employer (transferee) in a particular situation dispute that there is a TUPE transfer when I believe that there is one?

You should assert that there is a TUPE transfer and remind both employers of their obligations under TUPE (as set out in the next chapter). You should also seek advice from your full-time official.

4. Effect of a TUPE transfer on employees' contracts of employment

a. The old and new employers' positions/obligations

When there is a relevant transfer, the position of the old and new employer is as follows:

- The new employer (the transferee) takes over the contracts of employment of all employees who were employed in the undertaking immediately before the transfer or who would have been so employed if they had not been unfairly dismissed because of the transfer. The new employer cannot just pick and choose which employees it wishes to take on.

- The new employer takes over all the rights and obligations arising from those contracts of employment except for criminal liabilities and some rights and obligations relating to old age, invalidity and survivors' benefits under occupational pension schemes (see later). As a result, a new employer will inherit liabilities, for example, for a disability discrimination claim being pursued by an employee in relation to the old employer's treatment and usually for any personal injury claims where the injury occurred before the transfer.

- The new employer inherits any collective agreements which were in force immediately before the transfer and which were made by the old employer or on its behalf in respect of any employees transferring to it.

- Where a union or unions were recognised in respect of some or all of the transferred employees by the old employer and the transferred entity retains an identity that is separate from the rest of the new employer's business, the new employer will be required to recognise any such union or unions to the same extent as the old employer recognised them before the transfer. If, however, the transferred entity simply merges into the new employer's business and does not retain a separate identity, then recognition lapses and the union(s) and the new employer will need to negotiate a new recognition agreement.

- Both the old and the new employers have obligations to inform and consult with a recognised union/employee representatives about issues concerning the transfer – see below.

b. Employees' position

The position of employees of the old or new employer following a TUPE transfer is as follows:

- Employees who are dismissed for a reason connected with the transfer may be able to pursue claims for automatically unfair dismissal – see later.

- Those employees who are not dismissed and who transfer to the new employer automatically become employees of the new employer. Their period of continuous employment with the new employer is measured from the point at which they started with the old employer (or any previous employer if there was an earlier TUPE transfer) and is not broken by the fact that their employment has transferred. The date upon which their continuous employment began should be recorded in their contract of employment or their statement of terms and conditions.

- The transferred employees will, subject to limited exceptions, be employed by the new employer on the same terms and conditions as those that they were employed under by the old employer and the rights and obligations that existed under their old contracts of employment will also transfer to their new employer. The primary exception to this relates to occupational pension rights. In addition, there are provisions that may allow the new employer to make some variations to their contracts – see below.

- Occupational pension rights earned up until the time of the transfer are protected. However, the new employer does not have to maintain the same occupational pension arrangements for the transferred employees as they had previously. Instead, where the transferred employees were previously part of a money purchase pension scheme, the new employer is required to make contributions that match the employees' contributions up to a maximum of 6% of pensionable pay. Where the transferred employees were previously part of a final salary or hybrid scheme, the new employer must meet the minimum benefit standard required for final salary schemes which are contracted out of SERPS or must provide the employees with benefits which are equivalent to a value of at least 6% of pensionable pay for each year of employment.

c. Variations of terms and conditions

The general position is that the terms and conditions of the transferred employees are protected following the transfer and the new employer is limited as to what changes it can make. Specifically, the new employer cannot make changes to transferred employees' contracts where the sole or main reason for so doing is:

- the transfer itself; or
- a reason connected with the transfer which is not an economic, technical or organisational reason entailing changes in the workforce.

Similarly, the old employer cannot make variations in anticipation of the transfer for either of these reasons. Any variations made for either of these reasons will be void.

However, where the sole or main reason for the variation is a reason unconnected with the transfer, such as a sudden downturn or upturn in work following the transfer (resulting in a reduction or increase in working hours, for example), the variations will not be prevented by the Regulations. Similarly, where there is an economic, technical or organisational reason entailing changes in the workforce for making the changes, such as a requirement for certain managerial employees to move to non-managerial roles, then such variations to people's contracts will probably not be prevented by the Regulations. Nevertheless it should be remembered that to make such variations, the employer will still need to obtain the employees' consent in the usual way. The employer cannot simply impose the variations. There are also insolvency situations where variations may be made – see later.

Guidance for workplace representatives

What should I do if a new employer advises in a TUPE situation that it is only prepared to take on some but not all of the employees employed in the undertaking or the part that it is purchasing?

There are some situations where an employer may have good reason for not taking on employees, for example if certain employees are only working in the part transferred on a temporary basis. You should therefore ask the employer in the first instance to provide you with reasons why it is not taking on all of the employees working in the part transferred. Generally, however you should assert that the new employer cannot "cherry pick" employees and that the contracts of employment of all of the employees employed in the undertaking/the part that is transferring will transfer to it. You should also assert that any employees not transferring will have been automatically unfairly dismissed and that the new employer will be liable for such dismissals.

If there is a transfer of part of an undertaking, can the old employer keep employees that it wants and only transfer those it doesn't want to keep on?

When there is a TUPE transfer, all of those employees assigned to the part transferring will transfer to the new employer and the old employer cannot prevent this by retaining those people that it wishes to keep. If the old employer does wish to keep certain staff, they will need to be permanently moved to another part of the undertaking that is not being transferred before the transfer takes place. This may or may not be permitted by the employees' contracts of employment.

If the old employer dismisses employees before a TUPE transfer but because of the transfer, does TUPE mean that the new employer has to re-employ them?

No. The new employer does not have to re-employ them, but liability for their dismissals will probably pass to the new employer if it can be established that the reason for the dismissals was connected to the transfer. Employees dismissed in such circumstances should therefore submit unfair dismissal claims against the new employer as well as the old employer.

Can a new employer vary the terms and conditions of transferred employees in order to harmonise conditions ie to put the transferred employees onto the same terms and conditions as the rest of its workforce?

No. The Regulations do not permit this. The only occasions when variations can be made are when they are not being made by reason of the

transfer or when they are being made for an economic, technical or organisational (ETO) reason entailing changes in the workforce. ETO reasons do not allow new employers to harmonise terms and conditions between workforces, they simply involve changes to functions or composition of the workforce. See above for further details.

It is worth remembering that pension schemes are not completely protected by TUPE. The new employer is required to offer a pension scheme to the transferring employees. However, it does not have to match exactly the provisions made by the old employer. See above for further details.

What effect do the Regulations have on annual pay negotiations or reviews?

The Regulations should have little, if any, effect. Following a transfer, negotiations will naturally have to take place with the new employer, but otherwise should proceed as before.
Union representatives should be mindful that transfers can, in some cases, lead to a two tier workforce in circumstances where transferred employees remain working under terms and conditions negotiated with a previous employer while new recruits receive less favourable terms. This can weaken union organisation and undermine collective agreements. Where possible, representatives should negotiate for new staff to receive the same terms and conditions as transferred employees during the consultation stage. In cases where the old employer continues to exist, representatives may also decide to conduct reviews on comparative terms and conditions in the transferor and transferee employers and to negotiate to keep terms in line with the previous employer if these are more favourable.

■ 5. Dismissals and redundancies

TUPE states that employees who are dismissed either before or after the transfer where the sole or main reason for the dismissal was:

- the transfer itself; or
- a reason connected with the transfer which is not an economic, technical or organisational reason entailing changes in the workforce ("an ETO reason")

will be found to have been automatically unfairly dismissed.

If the reason or the main reason for the dismissal is an ETO reason, then the next issue to consider will be whether the dismissal was fair according to "normal" unfair dismissal rules. If the dismissal is found to be fair according to these rules, then any unfair dismissal claim will fail. If, however, these rules have not been followed - for example, if it is found that the employee was not given proper warning of their dismissal, or that the statutory dismissal and disciplinary procedures were not properly followed when they should have been, or that fair selection criteria were not applied in a redundancy situation - then the unfair dismissal claim will probably be upheld. Employers can of course dismiss fairly for reasons that are unconnected with the transfer such as capability as long as they go through proper procedures and their decision to dismiss is reasonable in the circumstances.

Redundancy

A very common ETO reason that employers put forward is redundancy: the employer will argue that there was or would be insufficient work after the transfer for all of the employees that should have transferred or did transfer. As long as the redundancies have otherwise been carried out fairly, i.e. proper selection criteria have been applied and proper procedures followed, then these dismissals will usually be found to be fair. If it is found that the dismissals were by reason of redundancy, then those employees should be entitled to redundancy payments, as long of course as they satisfy the other criteria for being entitled to such payments (for example, having been continuously employed for 2 years).

If redundancies are made either before or after a transfer and it is unclear whether the transfer was a relevant transfer, then claims for a redundancy payment and also for unfair dismissal should at least initially be submitted against both the old and the new employer, to be on the safe side.

Guidance for workplace representatives

Does it make a difference if it is the transferor (the old employer) or the transferee (the new employer) that dismisses the employees?

If the sole or main reason for the dismissal is the TUPE transfer or a reason connected with it that is not an ETO reason, then the dismissal will be automatically unfair whether it is carried out by the old or new employer. Similarly, if there is an ETO reason for the dismissal or if the dismissal is not by reason of or connected to the transfer, then the same tests of reasonableness according to "normal" unfair dismissal rules will be considered in relation to the dismissal whichever employer has actually dismissed the employee. Whichever employer dismisses, employees would usually be well-advised to initially put in unfair dismissal claims against both employers to be on the safe side.

If I lose my claim of unfair dismissal, will this affect my entitlement to a redundancy payment?

As long as it is found that an employee was dismissed on grounds of redundancy, they will still be entitled to a redundancy payment if they satisfy the other criteria for being entitled to such a payment. This remains the case even if it is found that their dismissal on grounds of redundancy was fair.

What if either the old or the new employer says that it will dismiss employees either before or after a transfer?

You should try and find out the reason for the dismissals. If it appears that the reason is the transfer or for a transfer-related reason which is not an ETO reason, then you should assert that such dismissals will be automatically unfair. If the reason does appear to be an ETO reason or is not connected with the transfer, then, although you should not accept that the reason is not connected with the transfer or is an ETO reason, you should ensure that proper procedures are followed and bring any other issues of fairness and reasonableness to the attention of your full-time official as soon as possible.

■ 6. Informing and consulting about the transfer

Both the old and the new employer are under obligations to provide information to and, in some circumstances, to consult with representatives.

In practice, normally the old employer is obliged to provide representatives with various pieces of information about the transfer, and the new employer is obliged to provide the old employer with information about any actions that it intends to take in connection with the transfer that will affect employees (for example, where redundancies are envisaged) so that the old employer can provide such information to the representatives.

In addition both the old and the new employer will have a duty to consult with representatives with a view to seeking their agreement where that employer envisages that actions will need to be taken in connection with the transfer that will affect the employees.

The revised Regulations also impose a new obligation on the old employer to provide certain information about the employees who will transfer to the new employer.

a. What information does the employer have to provide to the representatives?

The employer has to inform the representatives:

1 - that the transfer is going to take place, approximately when, and why;

2 - of the legal, economic and social implications of the transfer for the affected employees;

3 - whether the employer envisages taking any action in connection with the transfer which will affect the employees, and if so, what;

4 - (where the employer is the old employer) of the actions in connection with the transfer that it envisages that the new employer will take, or, if the old employer envisages that the new employer will not take any such actions, then it must inform the representatives of that fact.

b. Who are "affected employees"?

"Affected employees" include:

1 - employees who will be transferred to the new employer;

2 - employees who will remain with the old employer but whose jobs might be affected by the transfer or by any actions that either the old or the new employer takes in connection with the transfer;

3 - employees who are already employed by the new employer but whose jobs might be affected by the transfer or by any actions that either the old or the new employer takes in connection with the transfer.

c. When does such information have to be provided?

Although there is no specific time period within which the information has to be provided, the Regulations state that it should be provided long enough before the transfer to allow there to be sufficient time for consultation. The appropriate length of time in each situation will depend upon factors such as how much notice of the transfer the old employer had, and when the old employer itself managed to obtain the information that it needed to provide to the representatives.

d. Consultation – what is required?

If the new or old employer envisages taking actions in connection with the transfer that will affect employees it must consult with their representatives as well as provide the information detailed above. For example, an employer should consult if there is an intention to relocate the transferred business or make redundancies.

The consultation must be carried out with a view to reaching agreement with the representatives about the actions in question. In the course of the consultation the employer must consider any representations made by representatives and, if the employer rejects those representations, it must state its reasons for doing so.

e. Who are the appropriate representatives?

Where affected employees are represented by an independent recognised trade union, information must be provided to, and consultation must take place with, that union. The employer cannot decide that it would prefer to inform and consult with other employee representatives instead (although it can inform and consult with employee representatives in addition to informing and consulting with union representatives).

Where there is no recognised union, the employer must inform and consult with employee representatives who may either be existing representatives or new representatives elected specifically for the purpose of informing and consulting in relation to the transfer. If existing representatives are to be involved, the employer must ensure that those representatives have sufficient authority from the employees concerned to obtain information and undertake consultation on behalf of those employees. Consultation with, for example, a Works Council which is regularly consulted in relation to personnel issues or issues about the company's financial position would probably be appropriate.

Representatives are entitled to facilities and resources during the consultation process. The minimum facilities that the employer must provide under the regulations are access to the affected employees and such accommodation and other facilities as may be appropriate. Representatives should also insist on the right to meet with reps from the workplace to which work is being transferred.

In addition, representatives of recognised trade unions should have reasonable time off to prepare for negotiations and consultation, to inform members of progress and to explain outcomes to members in line with the ACAS code of practice on time off for trade union duties and activities.

f. Special circumstances

The Regulations state that if there are special circumstances which make it not reasonably practicable for an employer to fulfil its information and consultation obligations, the employer must still take such steps to meet its obligations as are reasonably practicable. Special circumstances normally involve there being a sudden unforeseen event.

g. Employee liability information

The revised Regulations introduce a new obligation on the old employer to provide information to the new employer before the transfer takes place about the employees that will be transferring. The information which must be provided (known as "employee liability information") is as follows:

1 - the identity and ages of the employees who will transfer;
2 - information contained in those employees' statements of employment particulars;
3 - information relating to any collective agreements which apply to those employees;
4 - instances of disciplinary action taken by the old employer within the previous 2 years in respect of those employees which fall within the scope of the statutory dispute resolution procedures. This essentially means disciplinary action based on an employee's conduct or capability other than oral or written warnings;
5 - instances of any grievances raised by those employees within the previous 2 years which fall within the scope of the statutory dispute resolution procedures;
6 - instances of any legal actions taken by those employees against the old employer in the previous 2 years and instances of any potential legal actions which may be brought by those employees where the old employer has reasonable grounds to believe such actions might occur.

Such information needs to be given to the new employer at least 2 weeks before the completion of the transfer. Unfortunately there is no obligation to provide a copy of the employee liability information to a recognised union.

Guidance for workplace representatives

What information can union or employee representatives expect to receive?

The details of what should be provided are set out at section 6(a) above.

If you believe that the employer has failed to provide all the required information you should raise this in writing with the employer. In addition, whilst there is no requirement on the employer to provide the employee liability information mentioned above to representatives, it may be worth requesting such information in any event as the old employer may be willing to provide it to representatives.

What information can representatives not expect to receive?

Representatives will not be entitled to detailed information about the finances of the undertaking or about the tendering process where a number of tenders for the undertaking have been received. However, it may still be worth asserting in certain situations that representatives are entitled to such information as there may be circumstances where it would be appropriate for employers to provide it.

How do the Information and Consultation of Employees Regulations 2004 ("the ICON Regulations") fit in with the obligations to inform and consult under TUPE?

The ICON Regulations require there to be information and consultation in certain specific circumstances including situations where there is a TUPE transfer. However, in such a situation, as long as the employer has complied with its obligations under TUPE, it does not need to also comply with what are effectively the same obligations under the ICON Regulations. It may however be worthwhile referring an employer to any obligation to inform and consult under the ICON Regulations in situations where there is not a TUPE transfer and there is therefore no obligation to inform and consult under TUPE (for example where there is a sale of a part of an undertaking which is not a TUPE transfer but which is likely to result in changes in work organisation).

What does consultation "with a view to seeking their agreement" mean?

This does not mean that the employer has to reach agreement with the representatives, simply that it must enter into consultation in good faith intending to do so. Therefore representatives cannot block changes simply by not agreeing to them during consultation.

■ 7. Insolvent businesses

Where the old employer is subject to insolvency proceedings, the new Regulations introduce various special provisions that mean amongst other things that in certain situations some of the old employer's liabilities do not transfer to the new employer even when there has been a relevant transfer. The new Regulations also allow variations to the terms and conditions of transferred employees in some insolvency situations which would otherwise be prohibited. The purported purpose is to promote a "rescue culture" which encourages employers to take over struggling businesses.

a. Different kinds of insolvency

Although there are a number of types of insolvency proceedings, TUPE divides them into two categories:

- insolvency proceedings begun with a view to liquidating the assets of the business – that is to say there is no intention to sell the business on as a going concern. These would include the bankruptcy of the old employer and where there is a Court or voluntary liquidation.
- insolvency proceedings which are not begun with a view to liquidating the assets of the business – that is to say the intention is to "rescue" the business by selling it on as a going concern. This would include insolvency situations such as administrations and some voluntary arrangements.

The key issue is the purpose of the insolvency proceedings. This may not be clear and you should always seek advice from your full-time official in any insolvency situation.

b. Insolvency proceedings which are undertaken with a view to liquidation

Where there is a TUPE transfer of the old employer's business or undertaking and that business or undertaking is subject to this type of insolvency proceedings, TUPE sets out 2 main consequences:

i) the contracts of employment of those employees who were employed in the undertaking which would ordinarily transfer to the new employer will not transfer. Consequently, any buyer of the assets of the old employer's business will not take over these employees or the liabilities or duties arising under their contracts of employment;

ii) the dismissals of any of those employees who were employed in the undertaking transferred which would ordinarily be automatically unfair will not normally be automatically unfair. In addition, as stated in (i) above, the liability for such dismissals will not transfer to the new employer but will remain with the old insolvent employer.

c. Insolvency situations which are not undertaken with a view to liquidation

The normal rule that the new employer inherits all liabilities related to employees who transfer to it or who would have done if they had not been automatically unfairly dismissed in connection with the transfer does not apply. In addition there is a relaxation of the TUPE rule prohibiting changes to terms and conditions.

More specifically:

i) Some of the old employer's debts and liabilities will not pass to the new employer and will instead be settled by payments from the National Insurance Fund. The debts that will not pass to the new employer include statutory redundancy payments, up to 8 weeks' arrears of pay, statutory notice pay, certain amounts of holiday pay and a basic award in an unfair dismissal claim. All of these payments will be calculated by capping the rate of a week's pay at the statutory maximum, which is currently £350 per week. As mentioned, employees owed these sums will recover them from the National Insurance Fund rather than from the new employer, in much the same way as if there was no TUPE transfer of the business or undertaking and the old employer was simply insolvent.

It should be noted that employees will receive these payments (with the probable exception of statutory redundancy payments and a basic award) even if they have transferred to the new employer and not been dismissed.

The liability for any money owed over and above the payments that employees will receive from the National Insurance Fund will transfer to the new employer in the usual way. So for example if an employee is owed 10 weeks' arrears of pay and earned £390 per week, they would recover 8 weeks' pay capped (currently) at £350 per week and liability for the balance of money owing would then pass to the new employer. Also, compensation for things like injury to feelings in a discrimination claim successfully pursued against the old employer but not paid out before the transfer or the compensatory award in an unfair dismissal claim would be the responsibility of the new employer

from the time of the transfer as the National Insurance Fund does not make payments in respect of these types of compensation.

ii) TUPE allows greater scope for variations to be made to the contracts of transferring employees. The restrictions detailed above on varying contracts of employment are effectively waived in this type of insolvency situation and TUPE will not prevent "permitted variations" (which may result in employees being employed on inferior terms and conditions) from being agreed.

There are a number of requirements that apply to variations made in these circumstances. These are as follows:

- the old employer, new employer or the insolvency practitioner must agree the variations with "appropriate representatives" of the employees. "Appropriate representatives" for these purposes are effectively the same as "appropriate representatives" for the purposes of information and consultation, namely a representative of an independent union which is recognised for the purposes of collective bargaining in respect of any of the transferring employees if there is one, and if there is not, then employee representatives who have either been elected as such previously (perhaps for the purposes of information and consultation) or who are specifically elected for the purposes of negotiating such variations. See the " Guidance" section below for important information about agreeing variations.

- Two additional conditions will apply where variations are being negotiated by employee representatives rather than union representatives. First, there must be a written agreement recording the permitted variations which must generally be signed by each of the representatives. Secondly, before the agreement is signed the employer must provide all of the employees whose contracts will be varied with a copy of the agreement and any guidance that they would reasonably need to understand it.

- any variations agreed, whether by union or employee representatives, must be "permitted variations". These are variations which are being made by reason of the transfer or for a non-ETO reason connected with it, and which are being made with the intention of safeguarding employment opportunities by ensuring the survival of the business or undertaking. However, any variations made must not breach other statutory entitlements. So whilst variations reducing rates of pay or working hours may not be prohibited by TUPE, reducing the rates of pay to levels below the national minimum wage would be.

Guidance for workplace representatives

How will the provisions on varying contracts work in practice?

The provisions mean that union and employee representatives will not be prevented by TUPE from negotiating variations to the terms and conditions of the transferring employees. However, this is not the same as saying that such representatives will be permitted to negotiate variations as a matter of course in these types of insolvency situations. It is very important to remember that even when unions have collective bargaining rights in respect of groups of employees, they will often not have the right to vary the individual contracts of employment of such employees. As a result, if, in an insolvency situation of this nature, you are approached with a view to negotiating variations, you must IMMEDIATELY seek advice and guidance from your full-time official, both on the issue of whether you have authority to negotiate variations to individual contracts of employment and on the nature of the variations being suggested before entering into such negotiations.

■ 8. Remedies

Possible complaints that should be considered in any TUPE situation include the following:

a. Unfair dismissal claims

Employees who have been dismissed may have claims for automatically unfair dismissal if they can establish that their dismissals were by reason of the transfer or for a reason connected with it which was not an ETO reason.

Employees who have been dismissed may also have claims for unfair dismissal in accordance with the "normal" unfair dismissal rules, even if their claims for automatically unfair dismissal fail. Claims for "normal" unfair dismissal will generally succeed if the employees can establish that the employer did not act reasonably in dismissing them, for example did not follow proper procedures or did not properly warn or consult employees prior to selecting them for redundancy. Claims for automatically and "normal" unfair dismissal should be submitted to the Employment Tribunal so that they reach the Tribunal within three months of the date of dismissal. For example, if an employee is dismissed on 5 January, the deadline for submitting a claim will be 4 April. If an unfair dismissal claim is not begun within the three-month period, it will not normally be possible to pursue one at a later date.

b. Claims in respect of the obligations to inform and consult

Where either the old or the new employer has failed to comply with its obligations to inform and consult, claims may be pursued on behalf of affected employees to the Tribunal. Where there is a recognised union, the claim must be submitted in the name of that union. If there is any doubt about whether the union was recognised in respect of all affected employees, additional claims should also be presented in the names of the employees who may not be covered by union recognition. If there is no recognised union, then claims should be submitted in the names of the employee representatives. Again, additional claims should be submitted in the names of affected employees if there is any doubt as to whether the employee representatives were properly elected or had proper authority to engage in information and consultation on behalf of the affected employees.

If there is no recognised union and no employee representatives, then claims for the employer's failures should be submitted in the names of the affected employees. It should be noted that claims about failures to inform and consult may be pursued not just in respect of any employees who were dismissed, but also by those employees who were either retained by the old employer or transferred to the new employer. Complaints relating to failures to comply with the obligations to inform and consult should be submitted so that they reach the Tribunal within three months of the date of the transfer. For example, if the transfer took place on 5 January, the deadline for submitting a claim will be 4 April. As with unfair dismissal claims, if a claim is not begun within the three-month period, it will not normally be possible to pursue one at a later date.

Where a Tribunal upholds a complaint of failure to inform and consult, it may make an award of up to 13 weeks' gross pay to each affected employee. Recent case-law has established that Tribunals should, when considering how much to award, pay particular attention to the extent of an employer's failure to comply with its obligations rather than to whether employees have suffered financial loss as a result of failure.

If a Tribunal makes an award in favour of affected employees and an employer fails to pay, the affected employees must then pursue further complaints to the Tribunal about the failure to pay. Such claims should be submitted so that they reach the Tribunal within three months of the date of the Tribunal's order making the award.

c. Claims by representatives & candidates for election as representatives

As mentioned above, representatives and candidates for election as representatives have the right not to be subjected to a detriment because of their activities or proposed activities in connection with their role as representative/candidate. Claims about being subjected to a detriment need to be submitted so that they reach the Tribunal within three months of the date when the detrimental treatment took place.

d. Declaration of terms and conditions

If an employer imposes variations to the terms and conditions of employment of an employee who will transfer or has transferred and the employee wishes to challenge this on the grounds that TUPE does not allow for such variations (for example because such variations are made for the purposes of harmonising that employee's terms and conditions with the terms and conditions of the new employer's other employees), it may be appropriate to seek a declaration of the employee's terms and conditions from the Employment Tribunal. Such claims can be submitted to the Tribunal at any point during employment but must be submitted so that they reach the Tribunal within three months of the employment terminating where the employment is terminated. Employees should also object in

writing to any imposed variation to their terms and conditions of employment. Depending on the declaration made by a Tribunal, a claim seeking a declaration of terms and conditions may be a pre-cursor to other claims for, for example, unlawful deductions from wages or breach of contract in the County Court if the Tribunal finds that the variations were not permitted.

e. Claims for redundancy payments

Where there is a possibility that an employee might be found to have been dismissed by reason of redundancy, then a claim for a statutory redundancy payment may need to be considered. Such claims need to be submitted so that they reach the Tribunal within 6 months of the date of the dismissal. If there was a contractual redundancy scheme in operation, then the employee may also need to pursue a claim for breach of contract in relation to an outstanding contractual redundancy payment. Such a claim needs to be submitted so that it reaches the Tribunal within three months of the dismissal, and statutory grievance procedures also need to be followed in relation to such a claim so a grievance letter needs to be submitted as soon as possible after the dismissal complaining about the breach of contract – see below.

f. Claims for failure to consult about redundancies

Where there is a redundancy situation and an employer is proposing to dismiss 20 or more employees employed at one of its establishments within the space of 90 days, the employer will be under a statutory obligation to consult before making the redundancies about, amongst other things, ways of avoiding the redundancies or reducing the number of them and, mitigating the consequences of the dismissals. There is also an obligation on an employer to provide certain pieces of information to appropriate representatives in preparation for consultation. If, therefore, there is a possible redundancy situation before or after a transfer occurs and the old or new employer has not properly consulted or provided information prior to dismissing employees, claims for the employer's failure to consult may need to be considered. As with claims for failure to inform and consult in accordance with TUPE, the claim should generally be submitted in the name of any independent recognised union. If there is no independent recognised union, then claims should be submitted in the names of the employee representatives. If there is no recognised union and no employee representatives, then claims for the employer's failure should be submitted in the names of the dismissed employees. Complaints for failure to consult about redundancies should be submitted so that they reach the Tribunal within three months of the last of the dismissals taking place.

Where a Tribunal upholds such a complaint, it may make an award of up to 90 days' pay in respect of each employee who was dismissed on grounds of redundancy. Recent cases have established that the full 90 days should be awarded by a Tribunal to employees if an employer has completely failed to comply with its consultation obligations unless there are specific mitigating circumstances which would justify a reduction.

g. Equal pay claims

Members who are subjected to a TUPE transfer may have potential equal pay claims relating to their employment before the transfer took place. If equal pay claims have already been lodged with the Employment Tribunal and have been referred to the Union's lawyers then you need to make sure the lawyers dealing with the claims are aware that the TUPE transfer has taken place. They will be able to take any necessary steps with the Employment Tribunal to deal with the consequences of the transfer.

Where members may have equal pay claims which have not yet been pursued in the ET it is important that action is taken to protect members' interests. Any claim for losses which have accumulated up to the date of the transfer arising out of pay inequality must be pursued within 6 months of the transfer otherwise they will be time barred.

After the transfer has taken place, equal pay claims may be pursued in respect of losses continuing to accumulate after the date of the transfer, for so long as the employment upon which the claim is based continues.

Those, post transfer claims, can still rely upon comparators employed by the original employer if that was the basis of the pre transfer claim. New starters with the new (transferee) employer are unlikely to be able to rely on comparators employed by the transferor.

Claims may be pursued for post transfer losses at any stage up until the ending of the employment to which the claim relates. Claims must be pursued within 6 months of the end of the employment. The employment may be brought to an end in a variety of ways in an equal pay claim, including not only the termination of employment but also promotion, transfer, contractual changes of hours and changes from temporary to permanent status.

Equal pay claims are normally based upon an allegation that a male comparator earns more than the women claimants and that the reason why they earn more is tainted by sex discrimination. The fact that a comparator transfers away from employment in common with the

claimants does not stop the claim being pursued. In principle claims may be pursued against comparators provided they were in employment with the claimants at some period during the claimant's employment. Claims cannot be pursued for any period prior to the job that the comparators were employed to do, being done. There is nothing however to prevent a claim being pursued if the job is transferred out, or indeed if the job done by the comparator is made redundant.

Members who began employment for the first time after the comparators transferred out are in a more difficult position in relying on those men as comparators, but they should still be advised to seek legal assistance as their claims will not necessarily be hopeless

The time limit for bringing claims is governed by the woman claimant's employment and not that of the comparator. Even though the comparators may transfer out the woman claimants may bring their claim at any time during the period of their employment up until 6 months after its termination (see above).

In all equal pay claims the maximum time in respect of which a back pay claim can be made is six years prior to the date the claim is brought in the Employment Tribunal, so the earlier claims are pursued the better.

Guidance for workplace representatives

What advice should be given to members with potential equal pay claims when they are TUPE transferred?

It is very important to remember that the claim for losses accumulated up to the date of transfer must be brought, against the new transferee employer, within six months of the date of the transfer. Accordingly it is vital to ensure that members are advised of the position before and at the time the transfer takes place. They should also be told what arrangements Unite has to provide them with assistance and how they may obtain that. They must be specifically advised about the time limit.

How should I deal with members who wish to make an equal pay claim after a transfer has taken place.

Members should generally be advised to get legal assistance from the Union in connection with any equal pay problem. The legal position is complicated and you should not try and give legal advice yourself. Equal

pay claims may well exist against the new (transferee) employer even though there are no obvious comparators employed by him. Claims may well be able to be made relying upon comparators in the previous employment and this is the case for all that have transferred, even though that transfer might have taken place many years ago.

How should I deal with members who wish to pursue an equal pay claim but relying upon comparators who have been transferred out.

The fact that relevant comparators have been transferred out will not necessarily weaken an equal pay claim. There may well be circumstances where equal pay claims can be pursued relying upon comparators who were employed in the organisation even though they have now been transferred under TUPE.

Further guidance for workplace representatives

Against whom should claims be submitted, the old or the new employer?

It is generally advisable to submit all of the claims detailed above against both the old and the new employer, at least initially. It will often be the case that at the time when claims need to be submitted, there is too little information available to ascertain whether or not there has in fact been a TUPE transfer, or whether or not there is an ETO reason for any dismissals, for example. As a result, it is generally safer to submit claims against both the old and the new employer and then withdraw those claims against one of the employers once further information becomes available which demonstrates which employer is the correct respondent to the claim. It may not be possible to determine this without a hearing, in which case claims against both employers should be pursued until the Tribunal determines the correct respondent.

Do we need to appeal against dismissals and lodge grievances in other cases?

You must appeal against dismissal and lodge a grievance in respect of failure to pay enhanced redundancy or detriment on grounds of being a candidate for election as a representative or of being a representative, otherwise compensation may be reduced.

Notes:

Notes:

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