

A photograph of three business professionals (two men and one woman) sitting at a table in a modern office or cafe at night. They are working on laptops and looking at each other, engaged in conversation. The background shows a city skyline through large windows. The image has a dark, moody aesthetic with warm interior lighting and cool exterior city lights.

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How to manage a TUPE transfer

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Agenda

Pre-transfer – initial concerns

- What is TUPE?
- How to plan for TUPE
- Who will transfer under TUPE?

During TUPE

- How to inform and consult
- Providing opportunities to object

Post-transfer


- Dealing with changes to terms and conditions
- Typical issues

On the Horizon

- Other employment law updates

What is TUPE?

PURPOSE - to protect employees if the business in which they are employed changes ownership



EFFECT - to move employees and any liabilities associated with them from the old employer to the new employer



Transferor = original employer



Transferee = new employer

Pre-transfer Planning

Does TUPE apply?

TUPE applies to “relevant transfers”:

A Business Transfer - A transfer of a business or a part of a business where the ‘economic entity’ retains its identity

A Service Provision Change – Where a client engages a contractor to do work on its behalf and it re-assigns that contract or brings the work “in-house”

When does TUPE **not** apply?

Share sales

Transfers of assets where no change of identity of employer

Transfers between public administrations

Who will transfer?

The 'automatic transfer' principle

Employee contracts transfer automatically to the new employer

Applies to:

- All employees employed immediately before the transfer
- Employees who would have been employed, but were dismissed solely or mainly because of the transfer (exception if an 'ETO' reason)

Employees who object will not transfer (more on this later)

During TUPE

Duty to inform and consult

Duty on original employer and new employer

“Appropriate representatives”

Directly informing/consulting

- Businesses with fewer than 50 employees
- Transfer of fewer than 10 employees
- No existing representatives

What does 'Informing' mean?

Timing

- Information to be provided long enough before the transfer to enable the employer to consult appropriate representatives

Provide information

- The fact that there will be a transfer
- Date
- Reason(s)
- Implications/impact

What is the duty to consult?

Duty arises where an employer “envisages taking measures in respect of the affected employees”

Purpose – to seek agreement in good faith

Failure to consult – ET claim (compensation)

Right to object

Employees have the right to object

Must object before the transfer

Employment terminates (but no dismissal)

No compensation entitlement unless resignation due to:

- substantial change to working conditions
- serious contractual breach

Case study

“Sensible Manufacturing” has its cleaning services provided by an outside company called “Clean Right”.

Sensible manufacturing decide that it would be more cost effective to have their existing staff carryout the cleaning at the end of each day.

Sensible Manufacturing therefore notifies Clean Right that they no longer need them to supply cleaners.

Clean Right consider whether they can redeploy those cleaners, but determine that there is no other work available for them as this was the sole site the affected cleaners worked on.

Case study – what's the position on TUPE?

Cleaners now maintain that:

- TUPE applies, as a service provision change occurred when SM decided to bring the work in house
- their employment should transfer to SM

SM at risk of failure to inform and consult

SM must take on cleaners on existing t&cs
or risk claims for automatic unfair dismissal

Post-transfer

Post-transfer

New employer steps into the shoes of the original employer

Employees who object to the transfer do not become employees of the new employer

Can you change the employees' T&Cs?

TUPE restrictions

- Ineffective if “sole or principal” reason is TUPE transfer

Permitted changes

- “Economic, technical or organisational (ETO) reason entailing changes in the workforce”
- Variation permitted by existing terms

Examples of Typical Challenges

London United Busways Ltd v De Marchi and another [2024] EAT 191

- This case highlights challenges around:
 - employee's right to object to TUPE transfer
 - issues surrounding what amounts to a substantial change in working conditions
 - who remains responsible for terminating the contract in such a situation

FACTS OF CASE

Mr De Marchi bus driver employed by Busways at a garage approx. 15-minute walk from home and did not own a car

Busways lost contract for operating bus route that Mr De Marchi worked on to Abellio

Agreed that all drivers assigned to the route would transfer under TUPE from Busways to Abellio unless they objected

Route would be operated by Abellio out of a different garage, which would involve Mr De Marchi travelling approximately one hour each way to and from work

So what happened next?

- Options:
 - Transfer to Abellio, which would require moving garage.
 - Object to transfer, new contact with Busways to stay at current garage, subject to availability, with increase in maximum time on duty from nine to ten hours.
 - Resign, if above options unacceptable.
- Mr DM told redundancy was not an option
- Options unacceptable to Mr DM
- Mr. DM objected under Regulation 4(7), preventing the transfer of his contract, and declined to treat his contract as terminated under Regulation 4(9).
- Busways asserted that his objection ended his employment under Regulation 4(8), without treating it as a dismissal.
- Mr. DM claimed that he was dismissed by the transferor due to the substantial change in conditions.

What did the EAT say?

1. Impact of Employee Objection:

- Employee's objection prevents their contract from transferring to the new employer.
- This will terminate employee's contract with the transferor but does not treat it as a dismissal unless Regulation 4(9) applies.

2. Substantial Change in Working Conditions:

- Moving to a distant garage constituted a substantial and detrimental change to Mr. De Marchi's working conditions under Regulation 4(9).

3. Employer Liability for Dismissal:

- When an employee objects to a transfer due to substantial changes and chooses not to terminate their contract under Regulation 4(9), the transferor remains responsible for terminating the contract.

4. No Remedy Against the Transferee:

- Mr. De Marchi's employment did not transfer to Abellio, leaving no remedy against the transferee.

5. Mr De Marchi was dismissed by Busways day before transfer

Lewis v Dow Silicones UK Ltd [2024] EAT 51

This case considered an employer introducing changes to working conditions following a service provision change and highlighted the need for consultation around such changes and for there to be clear communication around the underlying reason for the changes.

Outcome and Appeals

Claim was dismissed, the ET found that the employer was entitled to introduce the changes as they were not to the claimant's material detriment TUPE did not apply.

The claimant appealed and the EAT upheld his appeal, finding that the tribunal's decision was perverse and that the changes were to Mr Lewis' material detriment.

The Claimant appealed to the EAT again, arguing that the second tribunal erred in law by allowing the employer to advance a new reason for dismissal that was not argued at the original tribunal hearing and by concluding that the ETO defence was made out.

Key takeaways from case

- Employer must ensure that they have:
 - a clear consultation
 - clear communication with employees when operational changes occur following a service provision change.

Summary of Practical Tips

Plan in advance

Ensure employee data records are accurate

Timing for inform and consult

Employee representatives – know who they are

Post completion – communication is key

Employment Law Updates

From 6 April 2025

- Neonatal care leave and pay for employees with responsibility for children receiving neonatal care
- The maximum compensatory award for unfair dismissal has risen to £118,223 or one year's pay, whichever is lower.



Case Law Update

For Women Scotland Ltd v Scottish Ministers [2025] UKSC 16 (April 2025)

Background/context

- Appeal by Scottish women's rights group
- The Supreme Court considered the interpretation of terms used in the **Equality Act 2010** ("EA 2010")
- Judgment on 16 April 2025
- Concept of "sex" is binary - "man" and "woman" refer to biological sex
- Gender Recognition Certificates (GRC)

Madu v Loughborough College [2025] EAT 52 (16 April 2025) – Costs Orders

Background/context

- Costs order - £20,000
- Appeal allowed
- Tribunal's assumption undermined decision
- Costs against unrepresented claimants
- Nature, gravity and effect
- Special consideration – discrimination claims

Impact Recruitment Services Ltd v Korpsya [2025] EAT 22 (11 February 2025)

Background/context

- Ms Korpsya (K) employed by agency – shut down 2020
- Unfair dismissal claim – upheld
- Agency appealed

Outcome

- Mistaken belief in resignation could potentially be a 'SOSR' reason (therefore fair)
- Reasonableness

Questions



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