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TUPE or not TUPE? That is the question

The [Transfer of Undertakings Regulations¹](#), commonly referred to as “TUPE”, are designed to ensure that, in appropriate circumstances, the rights of employees will be protected by their automatic transfer from one employer to another where there is a transfer of “an undertaking” which, essentially, means a business or part of a business in which the employee works.

Generally, in such circumstances, the employees take with them all of their terms and conditions of employment (with the exception of pensions) including their years of service. While most focus is on the employees’ rights, it is worth noting that their obligations also transfer. The employee’s current and prospective new employer each have specific obligations to inform the employee’s representatives (or in the absence of such, the employees directly), 30 days before the transfer, about:

- the date of the change,
- the reason for it,
- the legal implications, and
- a summary of any relevant economic and social implications for the employee.

Where material changes for employees (“measures envisaged”) are anticipated as a result of the change then both employers have an additional duty to consult with the employees before the transfer can take place, “with a view to reaching agreement”. Agreement may not

¹ European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 (S.I. No. 131/2003)

For further information on any of the issues discussed in this article please contact:



[John Doyle](#)
Partner Litigation

DD: + 353 (0)1 673 1786
john.doyle@dilloneustace.ie

be reached but there is a clear onus on the employers to enter meaningful discussions and their bona fides will be examined in the event of a complaint by employees. Since it is the new employer which will have most information about the future there is, in practice, more of an onus on it to consult while there are obligations on the current employer to provide certain information to the new employer to assist with that consultation process. Where either employer fails to inform or consult, as appropriate, an employee may bring a claim and if successful may be awarded “just and equitable” compensation of up to 8 weeks’ remuneration

Neither employer may dismiss an employee simply because of the transfer, but they may be able to do so if they can show “economic, technical or organisational reasons which entail changes in the workforce”. This typically arises where, after the transfer, the new employer has surplus employees and it needs to make some employees redundant. If this is foreseen before the transfer it would be a “measure envisaged” which would trigger the obligation to consult with employees before the transfer takes place. The employer which has received the new employees cannot simply decide to choose the transferred employees for redundancy. It would have to treat their existing employees and the new employees, together, on their merits taking into account the usual requirement of applying objective selection criteria. An employee whose employment is terminated may bring a claim for unfair dismissal, either under TUPE or under the Unfair Dismissals Act, but not both.

The Regulations are expressed to apply to the transfer of “an organised grouping of resources which has the objective of pursuing an economic activity whether it is central or ancillary to another economic or administrative entity and which retains its identity”. That formula (it hardly merits being called a definition) combined with the almost infinite variety of fact-patterns which might arise in practice, can lead to a very fundamental question as to whether the Regulations apply in a given situation and genuine doubts and differences of opinion may be expressed. In some instances, it is clear that the Regulations apply. The most obvious example is a merger of two companies to form a new company. In other situations, it can be less clear-cut. For example, quite commonly, a company may wish to sell off part of its existing business to another company. Where there are employees involved then this type of transaction raises the question as to whether any employees are covered by TUPE and if so, since not all of the business is being sold, which employees are covered? The Regulations do not define precisely the sorts of activities which constitute “an Undertaking” for the purpose of the Regulations, and the case law of the Court of Justice of the European Union demonstrates that an Undertaking can be anything ranging from an entire company down to a particular employee within a company, depending on the economic activity that the person carries out.

The essential test in deciding whether TUPE applies to a particular individual in a given situation, may come down to a “look and feel” type analysis where the outcome will depend on the extent to which the business activity concerned retains its identity after the transfer. For example, where a premises currently being operated as a Chinese restaurant is sold and the new owners intend

running a Chinese restaurant then it is likely that the business would be considered to “retain its identity” and the employees would have a good claim that they should be employed by the new owners by virtue of TUPE. However, if the premises were to be operate as a newsagents then it would not retain its identity and TUPE would not apply.

Whether a business retains its identity would involve a close examination as to whether assets were being taken over, whether employees were moving across and if it is decided that it is a relevant transfer such that TUPE applies, there would be a possible further examination as to whether each individual employee has a sufficiently close connection with the activity being transferred that they should be considered to be covered by TUPE. Issues arise, for example, where it is accepted that a transfer is happening and some employees spend part of their time on that activity but also work on activities which are not being transferred. In practice, considered judgement calls are made by parties to commercial transactions as to whether TUPE applies.

Due to the uncertainty surrounding TUPE, parties to a commercial transaction will seek to minimise their risk by stating in their agreements what they believe the position regarding TUPE to be and the consequences which flow from that and by negotiating indemnities to cover a situation where what they have agreed is successfully challenged by an employee leading to an award of compensation.

It is important to remember that, in the appropriate conditions, TUPE applies automatically by operation of law so the opinions of the contracting parties, however genuinely held, are always open to challenge by individual employees whose rights TUPE is designed to protect. An employee may seek to argue that TUPE applies and that they should be allowed to transfer or they may argue that TUPE does not apply and they are entitled to remain with their current employer. In the event of a dispute, the claim would be decided on its own particular facts. Where TUPE does apply and an employee refuses to transfer then that decision will be treated as a resignation and the employee will not be entitled to a redundancy payment or compensation.

In conclusion, the absence of clear definition in the Regulations of the circumstances in which TUPE will apply combined with the infinite number of real-life situations means that TUPE is something of a minefield. Whether TUPE applies and who is affected by it can be the subject of much debate. In any commercial transaction involving the transfer of a business activity or part of it, however small, consideration must always be given to the possible application of TUPE and appropriate provision made in the transaction documents.

DILLON  EUSTACE

Dublin

33 Sir John Rogerson's Quay, Dublin 2, Ireland. Tel: +353 1 667 0022 Fax: +353 1 667 0042.

Cayman Islands

Landmark Square, West Bay Road, PO Box 775, Grand Cayman KY1-9006, Cayman Islands. Tel: +1 345 949 0022 Fax: +1 345 945 0042.

New York

245 Park Avenue, 39th Floor, New York, NY 10167, U.S.A. Tel: +1 212 792 4166 Fax: +1 212 792 4167.

Tokyo

12th Floor, Yurakucho Itocia Building, 2-7-1 Yurakucho, Chiyoda-ku, Tokyo 100-0006, Japan. Tel: +813 6860 4885 Fax: +813 6860 4501.

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