



# Delivering the In-house option

Staffing Matters - TUPE

A city of opportunity where everyone thrives

# TUPE – basics

*The method by which human resources are transferred from one employer to another...*

---

- The Transfer of Undertakings (Protection of Employment) Regulations 2006
- Came into force on 6<sup>th</sup> April 2006, and replaced the previous 1981 Regs
- Regulations updated January 2014

## Intention of TUPE

- Protection of employment at point of transfer
- Automatic transfer to the new employer with contractual T's & C's protected
- Right to have service treated as continuous
- Right to be informed about the transfer
- Right to be consulted about 'measures'

# When does a service provision change?:

*In order to establish if you have a liability under TUPE Regulations you must establish if there is a service provision change...*

---

- A business or undertaking or part of one is transferred from one employer to another as a going concern
- Service provision changes can arise between contractors and the clients who hire their services. The changes involve;
  - Contracting out or outsourcing
  - Re-tendering
  - Contracting in or insourcing
  - TUPE applies when there are changes in service provision
- Where there is a transfer of a contract to perform an activity the 2014 provision requires the activity to be 'fundamentally the same as the activities carried out previously

# For a relevant transfer:

*Once you are satisfied that there will be a service provision change, it needs to be established that there are employees who should transfer with the 'activities' ...*

---

- There must be a new employer
- There must be 'an organised grouping of employees' undertaking the function which is transferring and employees must be assigned to the organised grouping
- There must be an economic entity which retains its identity
- Main purpose of the role 'principal purpose'
- If no identifiable grouping of employees there maybe no 'service provision change'

# Ceva Freight (UK) Ltd V Seawell Ltd (Court of Session, 21/06/13)

- Oil company decides to bring its logistics operation in-house
- One employee in outsourced warehouse devoted 100% of his time to contract - did he transfer?
- No said Court of Session - 'Organised Grouping' means some degree of conscious organisation
- A number of employees worked on contract but were not organised into a grouping. Single employee was part of that group but the principle purpose of the group was not the contract.

# Data & Asset Transfer

For the receiving organisation to function on the day of transfer, certain data must be requested and obtained...

---

## Recommended data to request:

- employee liability information ( 14 days to 28 days)
- statement of employment particulars
- policies/ handbook/ not discretionary benefits
- relevant collective agreements
- car lease data/ car loans/ phone contracts / vehicle hire
- who receives PMI / death grant/ benefits/ child care vouchers
- disciplinary, grievance , insurance claims , accidents , legal action (before the court or employment tribunal)

# Be aware:

Failure to supply the data required in a TUPE transfer may result in serious penalties...

- Transferor does not provide accurate or sufficient data – you may apply to employment tribunal for:
  - Such amount that is ‘just and equitable’ (having regards to the transferee’s loss and any contractual terms)
  - Compensation of £500 per employee in respect of whom the information was not provided ( or was defective) or,
  - Lesser sum if unjust or inequitable for minimum payment
- Information maybe indirectly supplied through a third party as in reassignment of a contract.

# Inform and Consult

A requirement of the regulations state that an employer must inform and consult once there is a reasonable prospect of a TUPE transfer...

---

- **With appropriate Representatives - TU's or employee reps.**  
If fewer than 10 employees – you are not required to facilitate elections of representatives for consultation purposes.
- **Employer (transferor) will inform and consult obligations, however new employer (transferee) will provide info on 'Measures' and ETO reasons.**
- **Must Inform on:**
  - Transfer will take place
  - Legal, economic and social implications
- **Must consult on**
  - Measures
  - ETO reasons
- **Costly to get wrong**



# Consultation : Getting it wrong

If an employee or Trade Union are dissatisfied with the consultation undertaken they can apply for compensation...

---

- The penalty for failing to comply with TUPE requirements around consultation =  
**13 weeks pay to each affected employee!**
- The transferor and transferee are jointly and severally liable for any award of compensation for failure to inform and consult
- Employees / representatives seeking redress for a breach of the information and consultations can choose whether to take action against the transferor or the transferee or both.

# Issues to consider:

There are essential activities that need to be completed when undertaking a TUPE to ensure that the organisation is not vulnerable to subsequent claims...

---

- Data Protection (GDPR)
- Legal responsibility to keep information up to date
- Immigration, Asylum and Nationality Act 2006 (the act)
- Agency workers – Agency worker Regs 2010 introduced changes to TUPE Info and Consult requirements
- **Warranties and indemnities:**
  - transferee seek to limit liability for actions before undertaking took place
  - mutual indemnities – employees left behind and those who transferred
  - inform and consult – joint & several liability for failure to consult

# So what can you change?

*TUPE regulations offer significant protection to the employees involved in a transfer, however the receiving organisation still has freedom to make changes under certain circumstances...*

---

- Collective Redundancy consultation before the transfer
- Reasons 'connected with a transfer' – dismissal and changes to t's & c's
  - the 2014 regulations removed the 'or a reason connected with it'  
(This is a cosmetic change)
- Change of Contract if it were derived from a collective agreement, and
  - more than 1 year after transfer
  - employees no worse off overall
- ETO Reason – relevant to dismissal & changes to terms
  - Economical, Technical or Organisational reasons
  - 'entailing changes in the workforce'
  - dismissal due to work location is no longer automatically unfair
- Changes in collective agreements post transfer – Dynamic or Static approach
  - (Alemo Herron v Parkwood Leisure)

# Pitfalls and considerations:

Whilst no two transfers are ever the same, there are similar issues and pitfalls that can be avoided if they are given consideration and are built into the project plan when commencing a transfer...

---

- Challenge employers on transfer list
- Data given – request more supporting evidence
- Medical records- request employees to agree for them to transfer
- Right to work – Immigration, Asylum and Nationality Act 2006  
£20,000 penalty per employee
- Pension – LGPS inform early
- Notify TU's within your organisation plus existing staff
- TUPE trumps many other employment laws – keep protective umbrella against Equal Pay Claims

# Harmonisation:

Just don't say it – its TABOO !!!...

---

I don't  
want to  
have  
'Two tier  
contracts'

Can we  
haronomise  
everyone

It would  
make life  
easier if we  
were to...

I want everyone to  
be the same

Its harder to use  
different  
policies and  
T's & C's

T  
A  
B  
O  
O

# Any Questions

Hayley Hammick – [hayley.hammick@Southampton.gov.uk](mailto:hayley.hammick@Southampton.gov.uk)