

## FACT SHEET

### **TRANSFER OF UNDERTAKINGS (PROTECTION OF EMPLOYMENT) REGULATIONS 1981**

Prior to the Transfer of Undertakings (Protection of Employment) Regulations 1981 (“TUPE”), on the transfer of a business from a vendor to a purchaser, employees’ contracts would automatically terminate and the employee would merely have the right to make a claim for a redundancy payment against the vendor, provided the employee satisfied the necessary qualifying conditions for this payment.

TUPE derives from the European Rights Directive. This provides that where there is a transfer of an undertaking or part of an undertaking, the contracts of employment are automatically transferred to the purchaser and the contracts will continue as if originally made between the employees and the purchaser. This means that it is possible for the contracting out of services by local authorities to the private sector to be covered by TUPE. If the purchaser does not wish to take on the employees previously employed, any dismissals prior to transfer may result in consequential claims against the purchaser. The key regulations of TUPE are regulations 5 and 8.

#### Regulation 5

Contracts of employment of employees employed in an undertaking or part of an undertaking immediately before its transfer will automatically transfer to the purchaser. This is unless the employee objects to being employed by the purchaser in which case the employee will not have a claim against either the vendor or the purchaser. The purchaser will then take on the liability for the employee whose terms of employment will remain as they were prior to the transfer. If the purchaser instigates the dismissal of the employee prior to the transfer, the employee is entitled to claim unfair dismissal against the purchaser. In order to avoid such claims, the purchaser will have to show that there is an economical technical or organisational reason requiring the changes in the workforce and that the procedural aspects of the dismissal were handled reasonably in compliance with the Employment Rights Act 1996.

#### Regulation 8

If there is a dismissal before or after the transfer and the transfer is the principal reason for the dismissal, the dismissal is automatically unfair. This is unless the purchaser can show there was an economic, technical or organisational reason for dismissing, providing the dismissals were procedurally fair. This defence is effectively only available where there is a genuine redundancy situation.

## Regulation 10

Affected employees are given the right to be provided with information and be consulted through their representatives (either union or elected) in respect of the transfer. Failure to comply with this regulation means the affected employee has the right to bring a complaint in the tribunal. Under Regulation 11, the tribunal must make a declaration that Regulation 10 has been breached and may make an award of compensation of up to thirteen weeks' pay for each affected employee.

## Pensions

The only terms of employment which did not automatically transfer from the vendor to the purchaser are within respect of pensions. This exception is qualified to some extent however. Regulation 7 confers an obligation on the purchaser to protect accrued pension rights. A contractual right to contributions to a personal pension scheme will transfer. As of 6<sup>th</sup> April 2005, the Pensions Act 2004 requires new employers to provide the transferring employee with a substantial contribution after a business transfer where Tupe regs apply. This affects occupational pension schemes of transferring employees in particular. Employers should obtain legal advice before proceeding with any transfer.

## Unfair Dismissal Claims

For an employee to claim unfair dismissal as a result of a TUPE transfer, they must have one year's continuous service. The period of service is calculated by taking the date the employee commenced employment with the vendor. The application to the tribunal must be made within three months of the dismissal so, for example, if the dismissal is effective on 1 January, the application must be received by the tribunal by no later than 31 March. It is always sensible however to write to the purchaser to inform them that the employee has a claim. The purchaser may then settle the matter without the need for instigating proceedings in a tribunal. If this procedure is adopted, one must always ensure the limitation period does not expire in respect of an application to a tribunal whilst negotiations are on-going. If necessary, it is always possible to secure the employee's position by submitting an application to the tribunal whilst negotiations are on-going as applications can be withdrawn prior to the hearing date, should the matter be settled through negotiation.

The maximum compensatory award for unfair dismissal claims is £56,800 and the basic award is £8,400.

**This fact sheet is not intended to be a definitive analysis of legislation. Professional advice should be taken before any course of action is pursued.**