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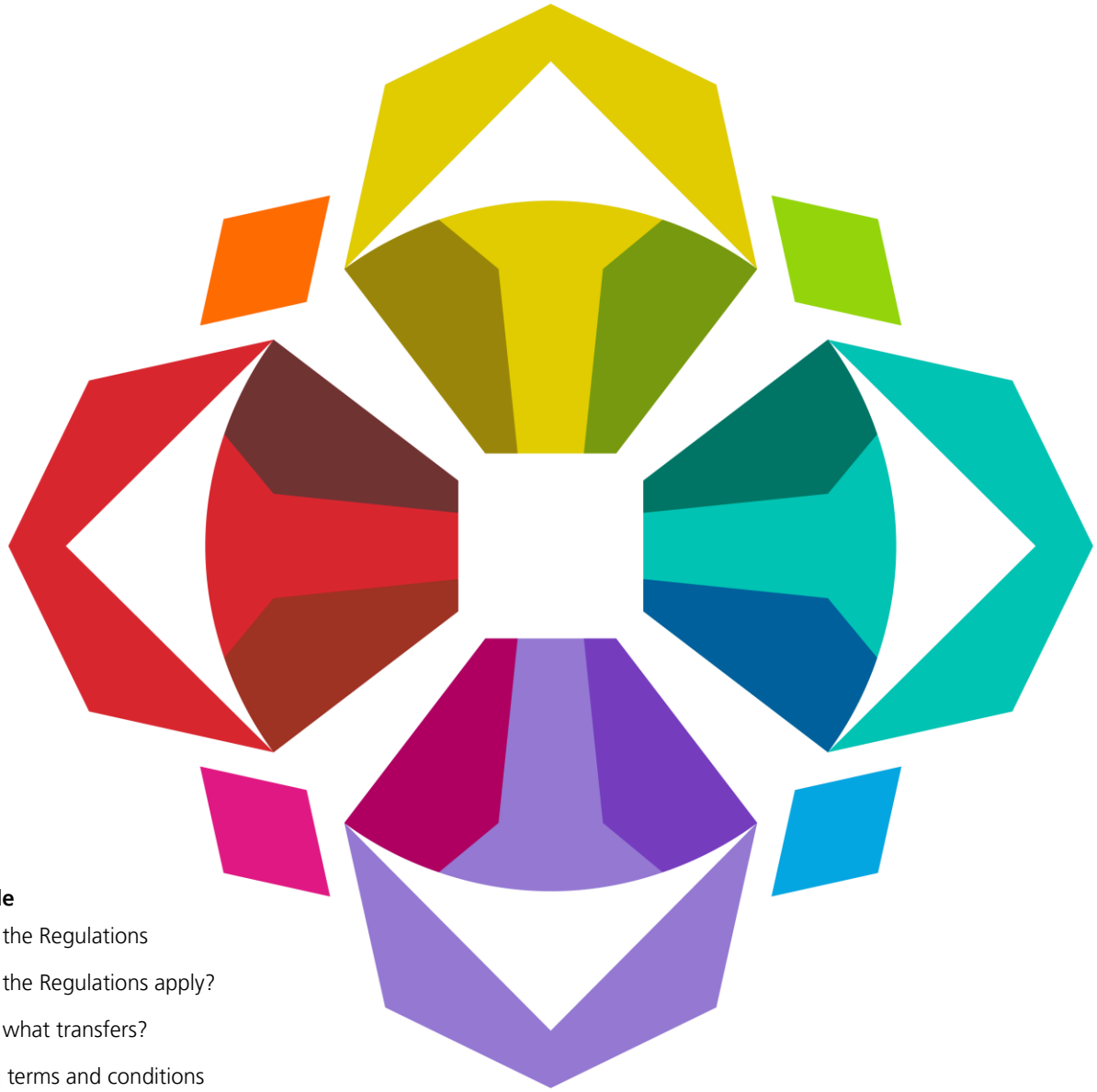
TUPE & the SPC Regulations in Northern Ireland



Inside

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) safeguard employee rights in the transfer of a business. In Northern Ireland, alongside TUPE, separate local legislation applies specifically in relation to the transfer of employment in service provision changes.

This inbrief summarises the main aspects of TUPE and the Service Provision Change (Protection of Employment) Regulations (Northern Ireland) 2006, how and when they apply, the obligations of the outgoing and new employers and briefly explains the areas of divergence between Northern Ireland (NI) and Great Britain (GB). For the purposes of this Inbrief, both sets of rules shall be referred to collectively as "the Regulations".

What are the Regulations?

TUPE applies in NI as it does in GB, but with two important differences. First, the service provision change aspects are governed by separate local legislation, the Service Provision Change (Protection of Employment) Regulations (Northern Ireland) 2006 (SPC Regulations). Second, the changes that were made to TUPE in 2014 and 2023 in Great Britain (GB) do not apply in NI. The TUPE position in NI therefore remains as it was in GB before 2014, however, this is currently subject to consultation.

The purpose of the Regulations is to protect the rights of employees when the business in which they work is transferred. Essentially, the Regulations ensure that the employees concerned, and their liabilities, transfer from the transferor (the employees' employer before the transfer) to the transferee (the entity that acquires the business or takes over provision of the services).

In outline, if the Regulations apply:

- staff employed in the undertaking or assigned to the grouping providing the services transfer automatically to the transferee on their existing contracts and their continuous service with the transferor is preserved
- liabilities in respect of staff transferring (e.g. for unpaid wages or claims such as for injuries or harassment) pass over to the transferee
- dismissals because of a transfer are unfair unless they are justified by an economic, technical or organisational reason entailing changes in the workforce (an "ETO reason"). The transferee is liable even if the transferor carries out the dismissal
- the transferor (and, in some cases, the transferee) has a duty to give information to elected staff representatives and must normally consult over the implications of the transfer
- the transferor is required to give the transferee information about the staff transferring, their contracts of employment and any associated liabilities

When do the Regulations apply?

- TUPE applies to any transfer from one employer to another of an economic entity (an organised grouping of resources which has the objective of pursuing an economic activity)
- The SPC Regulations apply to any service provision change, when there is an organised grouping of employees situated in NI, whose principal purpose is carrying out activities which are switching from one employer to another

A transfer of an economic entity occurs most clearly when there is a sale of business, which typically comprises assets such as premises, equipment, customers, staff and goodwill. In determining whether TUPE applies, it is necessary to identify the operation and what it comprises and then to consider whether it has transferred with its identity retained. In general, if the activities are the same, the customers are the same and staff are still required (even if not the same staff) that will often be enough for there to be retention of identity. However, all relevant factors will be taken into consideration when assessing each case and the weight given to different factors will depend on the nature of that particular business. Where the

shares of an existing business are sold, this does not of itself amount to a transfer because there is no change of employer.

In practice, a service provision change is more common and easier to identify. A service provision change occurs when: (a) a service is contracted out from a client to a contractor for the first time (outsourcing); (b) a service is reassigned from one contractor to another (second generation outsourcing); or (c) the service is brought back "in house" by the client. After identifying the service and whether it is actually transferring, it is then necessary to identify the organised grouping of employees (which must be situated in NI), identify its principal purpose, consider whether that organised grouping provides the whole of the service, and whether the services being performed by the organised grouping are transferring in their entirety. After that it is necessary to identify which employees are permanently assigned to the organised grouping and whether they will transfer.

A "one-off" buying-in of services from a contractor "of short-term duration" will not normally be covered. For example, the hiring of security staff to protect athletes during a major sporting tournament would be a short-term buying-in of services and so excluded from the Regulations, whereas a contract for the provision of security advice to the event organisers over a period of several years would potentially be covered.

In addition, activities mainly related to the supply of goods rather than services will not normally be covered. Examples are a contract where a business purchases components for machinery it is producing or buys sandwiches for re-sale in its canteen.

Amendments to TUPE in GB in 2014 provided clarity to the meaning of "service provision change" mirroring existing case law on the issue. Whilst such amendments did not extend to NI, the position remains essentially the same in NI because it continues to rely on pre-2014 case law. However, this is currently subject to consultation.

Who and what transfers?

The Regulations apply only to employees who are assigned, other than on a temporary basis, to the relevant undertaking or organised grouping of employees - this is not a simple percentage utilisation test. The question of whether an employee is "assigned" will depend on the particular facts including, for example, whether the employee was intentionally or formally allocated to the grouping (for example in the job description), how the costs of employment are allocated, whether the employee could work or does work on other activities in practice (and the importance of such activities), physical proximity to other employees in the grouping, whether the employee is permanently or temporarily allocated to the grouping, and other evidence of organisation into that grouping such as team lists, email groups, meeting attendances, etc.

Changing terms and conditions

The Regulations restrict the ability of employers to change employees' terms and conditions in the context of a transfer, even where the employees consent to the variation. The basic rule is that no variation of any contractual term is permitted where the reason is the transfer, or a reason connected with the transfer, unless there is an ETO reason for the change. This is regardless of how long after the transfer the variation takes place.

Notwithstanding this ETO exception it is still necessary to consider whether the variation to any contractual terms would be effective anyway under normal legal principles (which will usually require employee consent). Variations made with the intention of harmonising terms and conditions will normally be viewed as "by reason of the transfer" and therefore void. The employer must be able to point to circumstances to distance its reasons as far as possible from the transfer.

The ETO exemption is rarely helpful in the context of contractual variations given the need for the employer's reason to "entail changes in the workforce". This requires the existence of a clear link between the contractual variations and other changes to the numbers, functions or workplace locations of the affected employees.

An economic reason may be a reason relating to the profitability or market performance of the new employer's business. A technical reason may relate to the nature of the equipment or production processes operated by the new employer. An organisational reason may relate to the management or organisation or structure of the new employer's business.

In many cases employers will be unable to make legally binding changes to terms and conditions following on from a TUPE transfer, even if employees would agree to the changes - although in practice changes which benefit the employee or which are broadly neutral are unlikely to be challenged.

2014 amendments to TUPE in GB permitting contractual variation in limited circumstances do not apply in NI, which remains an issue for employers in this jurisdiction.

Dismissals because of a transfer

Where the sole or principal reason for an employee's dismissal is the transfer or a reason connected with the transfer, the dismissal will be automatically unfair under the Regulations. An employee is still required to have the necessary qualifying service to bring such a claim and the normal compensatory award limits still apply.

A dismissal occurring in the context of a transfer will not be automatically unfair if either:

- the reason for it is entirely unconnected with the transfer (e.g. misconduct)
- the sole or principal reason for it is an ETO reason entailing changes in the workforce

However, even when the dismissal is not automatically unfair, it may still be unfair if the employer does not have a good reason and does not follow the statutory disciplinary and dismissal procedure, which remains in force in NI.

In 2014, amendments to TUPE in GB confirmed that a change to the place of employment falls within the scope of an ETO reason. This amendment does not extend to NI, meaning that a change in location of the workforce, on its own, is not enough to amount to an ETO reason.

Information about employees and liabilities

The Regulations require transferors to give transferees employee liability information. This is information on:

- the identity and age of the employees within the scope of the transfer
- the statutory "statement of employment particulars" (i.e. all the information an employer is obliged to give an employee in a statement of terms and conditions of employment)
- any relevant collective agreement
- any disciplinary action or grievances instigated within the preceding two years
- any legal proceedings brought by the relevant employees against the transferor in the preceding two years
- any legal claim which the transferor has reasonable grounds to believe an employee may bring

Although this does not require a transferor to provide as much information as would be normal on a due diligence exercise before a sale of a business, it goes a long way to requiring disclosure of the most important information. Transferors will be required not only to identify who will transfer, but also many of their contractual terms.

The transferor must supply employee liability information at least 14 days before completion of the transfer (28 days in GB), unless there are "special circumstances" which make it not reasonably practicable to provide it in this time frame (a very limited exception in practice). It can be given in instalments and must be updated if there are changes.

If a transferor fails to comply with the rules on providing employee liability information, an Industrial Tribunal may order it to pay the transferee compensation. In deciding how much compensation to award, a tribunal will take into account various factors including any loss sustained by the transferee. The award must be a minimum of £500 per employee, unless the Tribunal considers it just and equitable to award less than this.

Obligations to inform and consult

The Regulations require the transferor to inform and (if appropriate) consult "appropriate representatives" of employees who are affected by a transfer. These are recognised trade unions or, if no recognised union, elected employee representatives.

The transferor must supply the following information:

- the fact that the transfer is to take place, when it will occur and the reasons for it
- the implications of the transfer for the affected employees
- any "measures" (i.e. material changes) that it is envisaged will be taken in connection with the transfer in relation to the affected employees. This might include any unavoidable changes to incentive arrangements, payroll date or benefit providers, consequential redundancies, a change to the workplace location, participation in a different pension scheme, the fact that the transferee's policies will apply in future, etc
- the transferor's use of agency workers.

When there are measures envisaged in connection with the transfer, the employer must consult appropriate representatives of affected employees with a view to seeking their agreement to them. This does not amount to a "veto" by unions or representatives, but the employer does have to engage in the consultation in good faith and explain where it does not agree.

It should be noted that "affected employees" are any employees - of either of the parties to the transfer - who may be affected by the transfer or measures taken in connection with it. This may include staff who do not transfer. Importantly, the transferee must supply to the transferor information about any measures it is proposing to take post transfer, long enough before the transfer to enable effective consultation with representatives to take place.

Where a transferor or transferee fails to comply with the rules on information and consultation, a tribunal can order a penalty of up to 13 weeks' full pay per affected employee.

Claims may be brought against either or both of the transferor and the transferee for failure to inform and consult and they will be jointly as well as individually liable to pay any penalty incurred, whichever party was at fault. (In practice, it is likely that a claim will be made against both the transferor and transferee, and then enforced, if necessary, against the one with the deepest pockets).

2014 reforms in GB permitted micro-businesses (those with fewer than 10 employees and no union/elected representatives) to inform and consult directly with employees rather than through employee representatives. For transfers taking place after 1 July 2024, employers in GB are permitted to consult with employees directly when one of the following is satisfied:

- *the business employs fewer than 50 employees, irrespective of the size of the transfer; or*
- *the proposed transfer involves fewer than 10 transferring employees, irrespective of the size of the business.*

Neither the 2014 nor 2023 exemptions have been implemented in NI meaning that, strictly, all employers have to comply with their information and consultation obligations with their union/elected representatives. In practice, some small employers invite the employees to agree that they will all be representatives, and all consulted together. However, these provisions are the subject of current consultation, and might, therefore, change in 2025.

Redundancies

In GB, provided the transferor agrees, the transferee is allowed to begin collective redundancy consultation with transferring staff even before the transfer. However, TUPE stops short of allowing the transferee to actually give notices of termination before the transfer nor does it sanction the transferor doing this on the transferee's behalf.

In NI, while TUPE does not prevent the transferee consulting about redundancies in advance, the minimum required period for redundancy consultation is not deemed to start prior to the transfer. In NI, redundancy collective consultation periods are a minimum of 30 days for 20-99 affected employees and 90 days for 100+ affected employees.

The 90 day consultation period for 100+ affected employees in NI is longer than that which applies in the same circumstances in other parts of the UK (45 days in GB). The differing requirements for collective consultation in large-scale redundancies can create complications for businesses undertaking UK-wide restructuring/reorganisation.

Transfer of insolvent businesses

The government has been committed to promoting a "rescue culture" for businesses that are or are likely to become insolvent. Consistent with this, the Regulations contain two specific measures, known as the "rescue provisions", to encourage the sale of insolvent businesses as going concerns:

- certain of the transferor's debts will not transfer to the transferee transferors or
- transferees and employee representatives - including union representatives, if a union is recognised - may agree changes to terms of employment (which would otherwise be void under normal TUPE rules) if agreed with a view to safeguarding employment opportunities by ensuring the survival of the business ("permitted variations")

These provisions will only apply if insolvency proceedings were entered into under the supervision of an insolvency practitioner and with a view to survival of the business or part of it, as opposed to liquidation of assets. If the insolvency was instituted with a view to liquidation, then the provisions of TUPE/the SPC Regulations which provide for automatic transfer of employees on existing contracts and automatic unfair dismissal for transfer-

related dismissals do not apply. However, a transferee who employs the employees of a business it has bought out of insolvency may find that those employees still have continuity of service (and so unfair dismissal rights) preserved under the Employment Rights (NI) Order 1996.

Future developments

Despite recent amendments, more change appears to be on the horizon with both major political parties in GB promising some type of TUPE reform. In May 2024, the Government launched a consultation on plans to change TUPE to clarify that the regulations should only apply to employees and not workers; and to confirm that if a business transfers to multiple buyers, the assigned employees cannot have their employment split between them, such that they would lack protection from TUPE because they were not assigned to any one part of the business. Meanwhile, the Labour party is promising to "strengthen the existing set of rights and protections, including for…workers subject to TUPE processes". Whilst the direction that TUPE will take in GB remains uncertain, previous experience suggests that, in NI, we may not follow GB in the proposed future reforms.

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