TUPE
- The Transfer of Undertakings Directive and Irish Employers

TUPE or the Transfer of Undertakings Directive of 1977, which became part of Irish law by the European Communities (Safeguarding of Employees’ Rights on Transfer of Undertakings) Regulations, 1980, protects the rights of employees where the business in which they are employed is transferred to a new owner.

It is a significant piece of legislation if you are selling your business or if you are working in a business which is being taken over.

What is an undertaking?
It is important to note that the TUPE directive covers undertakings and businesses or parts of undertakings and businesses - this leads to the critical question of what an undertaking is and as there is no definition in the legislation it has led to much case law with each case being decided on it’s own particular facts.

It is clear, though, that the following fall within the definition of an ‘undertaking’ for the purposes of the TUPE regulations:
- Schools, colleges, educational institutions
- Charities
- Local Authorities
- Health Boards
- Trade Associations
- Trade Unions
- State and semi-State bodies

Key elements of the TUPE regulations
The key thrust of the TUPE directive is that the rights and obligations in respect of employment contracts of the transferring business are transferred to the new business. There must be a change of employer - this is a fundamental criteria. A change of employer can occur where full ownership does not change (management responsibility may change and transfer to a subsidiary for example). Pension entitlements are excluded insofar as they do not have to be continued by the new company.

The parties to a transfer have an obligation to notify, inform and consult with employees or their representatives. If TUPE legislation is breached the problem rests with the new business (the transferee) The TUPE directive does not apply where the reason for the transfer is the insolvency of the transferring business.

TUPE also does not apply where the business is transferred by a transfer of shares. TUPE may apply even where there is no agreement between the two businesses, for example where a lease or franchise is surrendered by operation of law.
Key Aspects of the TUPE Regulations
The key takeaways from the regulations are:

- The rights and obligations arising from an employment contract transfer to the new employer from the old
- Employees’ pension rights do not transfer
- An employee cannot be dismissed solely on the grounds of transfer of undertaking
- If the working conditions arising from the transfer deteriorate significantly leads to a termination of employment the relevant employer will be held responsible for the deterioration.

Who does TUPE apply to?
Firstly employees, but also persons having an employment relationship with the transferor. This may mean agency workers, depending on who pays them, for example and the Labour Court has held that agency workers can be covered by the directive, depending on the particular circumstances of the case.

The ETO Defence
The TUPE regulations allow for the ETO (economic, technical, organisational) Defence. This means that dismissal of employees is permissible if the reasons are economic, technical or organisational. However, in Ireland this is recognised as a redundancy situation and the transferee will be liable for the redundancy costs.

To avail of the ETO defence legitimately the following must be present:

- Changes in the workplace
- Employees surplus to requirements.

To avail of this defence successfully, the employer must be able to show a bona fide decision to make changes in the workforce. It is worth noting that the ETO defence does not permit the employer to reduce the employee’s remuneration.

Consultation and Information
The Irish Regulations which implement the TUPE directive stipulate that:

1. Both the transferor and transferee have an obligation to inform the employees through their representatives about the transfer
2. The employees must be consulted about the transfer not later than 30 days before the transfer.

This consultation and information process must be done with a view to ‘seeking agreement’. Employees must be given written notices setting out the particulars of the transfer. If the employees’ rights are not recognised in this regard, injunctive relief can be sought.

After the transfer, the transferee is liable for any rights/obligations with the transferor discharged.

Protection of Employees (TUPE)
In general, the Protection of Employees on Transfer of Undertaking Regulations apply to any person:

- Working under a contract of employment, including apprenticeship
• Employed through an employment agency
• Holding office under or in the service of the State, an officer or servant of a harbour authority, health board or vocational education committee, and a member of the Garda Siochana or of the Defence Forces.

The Protection of Employees on Transfer of Undertaking Regulations apply to public and private undertakings engaged in economic activities whether or not they are operated for gain.

They do not apply to sea-going vessels.

In the case of agency workers, the party who is liable to pay the wages (employment agency or client company) is the employer for the purposes of these Protection of Employees on Transfer of Undertaking Regulations.

TUPE Consultation
The Employees (Provision of Information and Consultation) Act 2006 provides a general right to information and consultation for employees from their employer on matters which directly affect them.

In addition to this, under the Protection of Employees on Transfer of Undertaking Regulations, the employer must consult with the employees' union or, in the absence of a union, with the chosen representative(s) of the employees.

Both the original employer and the new employer must inform the representatives of the employees affected by the transfer, of:

• The date, or proposed date, of the transfer;
• The reasons for the transfer;
• The legal implications of the transfer for the employees and a summary of any relevant economic and social implications of the transfer for them, and any measures envisaged in relation to the employees.

The original employer must give this information to the employees’ representatives, where reasonably practicable, not later than 30 days before the transfer and in any event, in good time before the transfer occurs.

The new employer must give the information to the employees’ representatives, where reasonably practicable, not later than 30 days before the transfer occurs and in any event, in good time before the employees are directly affected by the transfer as regards their conditions of work and employment.

Where there are no employee representatives, the employers must arrange for the employees to choose (including by means of an election) representatives for this purpose.

However, if there are still no employees’ representatives in the undertaking through no fault of the employees, the employees concerned must be notified in writing, with the details described above, where reasonably practicable, not later than 30 days before the transfer and, in any event, in good time before the transfer.
The consultation obligations apply whether the decision resulting in the transfer is taken by the employer or another undertaking controlling the employer. The fact that the information concerned was not provided to the employer by the controlling undertaking will not release the employer from those obligations.

**Does Outsourcing Trigger TUPE?**

In Ireland, the transfer of undertakings is governed by the European Communities (Protection of Employees' Rights on Transfer of Undertakings) Regulations 2003 ("TUPE" or "the Regulations"). For those unfamiliar with TUPE, the Regulations, in a nutshell and in very basic terms, provide that the employees attaching to a business which is being transferred must transfer with the business to the new employer. Not only must the employees be transferred but they must be transferred with their accrued years of service, their existing terms and conditions of employment, and also with the benefit of any collective agreement to which they may already be subject.

While it is settled law that TUPE can apply to outsourcing, TUPE does not automatically apply to every outsourcing, or indeed insourcing, in Ireland. Similarly, a changeover of contractors is not a transfer of an undertaking of itself. Unlike their UK counterpart, which provides that TUPE applies in every outsourcing situation, the Irish TUPE Regulations are not as clear cut on this point and whether TUPE applies depends on the facts of each individual case.

In order to trigger TUPE an outsourcing, insourcing or changeover of contractors must involve the transfer of an economic entity which retains its identity. In an outsourcing situation, there must be an associated and related transfer of significant tangible or intangible assets or the transfer of the major part of the workforce in terms of numbers or skill. It follows then that in the absence of any transfer of assets or indeed a major part of the workforce in terms of skill or numbers, there is no “transfer” within the meaning of the Regulations and TUPE will not be triggered.

A distinction must be made between labour intensive businesses and asset reliant businesses. For example, in a labour intensive business, such as cleaning contractors, the deciding factor is whether the new incumbent accepts into its employment a major part of the workforce, in terms of their numbers and skills. Case law strongly suggests that in the context of an outsourcing where there is no transfer of assets and the new incumbent / transferee refuses to accept any of the employees into its employment, then the Regulations do not apply. Where the new incumbent does accept a major part of the workforce, the Regulations do apply; a chicken and egg result!

Accordingly, it can be the case that the actions of the parties to a proposed transaction can impact on whether TUPE is triggered, an issue of which all parties should be aware.

**Dismissal as a result of a Transfer of Undertakings**

The transfer of an undertaking, business or part of a business does not constitute grounds for dismissal.

However, there is nothing in the Protection of Employees on Transfer of Undertaking Regulations that prohibits dismissals if the employer can show justification for such dismissals for economic, technical or organisational reasons involving changes in the work-force.

However, a company must have clear, factual grounds for dismissals in these circumstances.
Termination of employment arising out of changes to working conditions to the detriment of the employee is regarded as the responsibility of the employer imposing the changes and would be considered to be a possible constructive dismissal.

Although the UK transfer regulations provide for a right of refusal to transfer to another employer, in Ireland the (Protection of Employees on Transfer of Undertakings) Regulations are silent on the consequences for an employee who refuses to transfer.

An employee cannot be forced to work for the new employer.

However, equally, an employee cannot insist on continuing to work with the old employer if the whole business, or the part of the business in which they have been employed, transfers.

Where an employee refuses to transfer, no liability ensues for the new employer - save where an employee sues for constructive dismissal.

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